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## THE COMMON LAW RIGHT OF RAILWAY CORPORATIONS TO TRANSFER THEIR FRANCHISES.

THE right of corporations *quasi* public to transfer their franchises, independently of any authority specially given for that purpose by legislative enactment, is one which is regularly denied in English decisions.

In this country the point is disputed. Certain cases contain opinions that railway corporations, independently of statutory authority, have the power to transfer their road and franchise. *Allen* v. *Montgomery Railway*, 11 Ala. 437, cited in Redfield, Railways, 574; note. In other cases opinions are expressed, denying such power in these corporations at common law, and asserting the necessity of legislative sanction. And where the English doctrine is approved, different grounds for the approval are given by different authorities, and it seems to be considered an anomaly, and one arising from the peculiar nature of the franchise which these corporations hold. In strictness, however, a doubt may be very reasonably entertained, whether the nature of their franchises is the only ground for denying to railroad corporations this right of alienation; and on principle, it seems that the denial to corporations of this right is not anomalous, but completely harmonious with the ancient principles of real property law; and that, taking the two cases of a grant of an alienable right in land to an individual, and a grant of an inalienable franchise to a corporation, the right of alienation given to the individual is the innovation on real property law, and the restraint on alienation by the corporation is strictly harmonious with it; and that the reason, both of the privilege and the restraint, is found in the purposes of the two grants.

In reality, under the ancient common law, there was nothing deserving the name of *property*, either in land, or in any other class of what we now call real property. For there was no

right of alienation. Land was merely the subject of the feudal relation of lord and tenant, for the purposes of public war and private plunder. The lord gave the tenant and his heirs the use and possession of the land, and covenanted to warrant it to them, in return for which the tenant and his heirs were to perform for the lord and his heirs the stipulated military services. And by this grant to tenant and his heirs must not be understood a conveyance of *property* in the land, as we now use the term; but it was merely a contract, so to speak, between the lord and his heirs on the one hand, and the tenant and his heirs on the other, that the tenant and his heirs should have the possession and use of the land, rendering to the lord and his heirs the military services. Neither, then, had what we call property in the land. The lord had not, for he had neither the possession, nor the right to the possession, of the land, and could not even part with his relation of lord, his seignory, without tenant's consent. Co. Litt. 309 a. The tenant had not; for though he had the right to the possession of the land, yet he could not alien his tenancy, the grant being made to him in consideration of his military services, and not those of any other party. Nor did this feoffment to tenant *and his heirs* mean that the heirs came in as successors to any property the tenant had in the land. They came in as parties to the original contract of feoffment (using for a moment this term "contract" to express the feudal relation). Co. Litt. 191 a, Butler's note, 77, V. 9, also same note, V. 3. For this is plain, from the fact that the heir held the land without being liable to the ancestor's debts; and in early times the grants of fees in subinfeudation had to be made not only with the assent of the lord of whom the land was holden, but of the heir also. Co. Litt. 271 b, Butler's note, 231. This could never have been the case, if the ancestor had, what we mean by property, in the land. And one reason why the tenant could not devise the land was, that the heir had the right to come in under the terms of the feudal contract.

And there is, on strict English common law principles, no such thing as a genuine alienation of land. Before the statute of *Quia Emptores*, there was nothing more than subinfeudation; and after the statute, it was merely subinfeudation still, with a statutory destruction of the intermediate seignory of the feoffer.

The restraints, then, against a practical alienation of tenancy in land, were removed by the statute of *Quia Emptores*, and in our own country never existed. But in certain branches of real property law, which originally followed exactly the princi-

ples applied to rights in land, these restraints remained in force. Under the ancient law, land was given to tenant and his heirs, and to no one else; he could not alien his tenancy, because the power to alien it had never been given to him. The land had been merely given him for him to live on, and fight for his lord.

So, also, a franchise is granted by legislature to a corporation, and to no one else; the corporation cannot alien their franchise, simply because the power to alien it has never been given. The franchise has been granted to the corporation to enjoy for the benefit of the public. This view, that the restraint against alienation rests simply on the bare fact that all the powers held by the corporation are given by legislative grant, and that the power to alien their franchise is not so given, seems to be supported by good authority.

Statements as to what the real franchise is, which is the subject of this alienation by the corporation, in the common case of a mortgage to secure railroad bonds, for instance, are sometimes made, which seem erroneous. In the case of *Hull* v. *Sullivan R. R. Co.*, 21 Law Rep. 140, the court says: "Among the franchises of the company is that of being a body politic, and of acquiring, holding, and conveying property, and suing and being sued by a certain name." And in *Bank of Middlebury* v. *Edgerton*, 30 Vt. 190, a lease had been executed by the corporation of their railroad, real estate, and personal property, for the term of three years, to one Clark. "We see no valid objection to the lease to Clark. It is not necessary that we should hold, that the franchise to this company, to be a corporation, is a subject of sale or transfer." But it would appear that this "franchise to be a corporation," is precisely the one which is the subject of sale and transfer, without a special legislative enactment, according to the terms of the ordinary acts of incorporation. The franchise belonging to the corporation is the one, it would seem, which cannot ordinarily be aliened; the "franchise to be a corporation," is held by the corporators, and is expressly made alienable. The act of incorporation of the Western Railroad, for instance, reads, "That Nathan Hale, David Henshaw, . . . . &c., their associates, successors, and *assigns*, be, and they hereby are, made a body politic and corporate, &c." And the *said corporation* now changing from Nathan Hale and assigns, the corporators, to the corporation which they form, "are hereby authorized to lay out and construct a railroad, &c." This right to be a corporation cannot be held without legislative grant; it is consequently a franchise; Kent's definition, 3 Kent Com. 458, and one held by the individual corporators.

The right "to be a corporation" cannot be conferred on a corporation before its own existence begins; yet it is conferred upon some one; and it is conferred on the corporators, the stockholders, and made alienable by the term of the grant. "It is likewise a franchise for a number of persons to be incorporated, and subsist as a body politic; with a power to maintain perpetual succession, and do other corporate acts; and each individual member of such corporation is also said to have a franchise or freedom." 2 Bl. Com. 37. When, therefore, it is asserted that "the franchise, to be a corporation, is therefore not a subject of sale and transfer, unless the law by some positive provision has made it so," (*Hall* v. *Sullivan R. R. Co.*, 21 Law Rep. 140,) there seems to be an error. For it is apprehended that the meaning of the court there is, that the "franchise to be a corporation," is the one ordinarily conveyed in a mortgage by a railroad corporation to secure the payment of money, like the mortgage in the case then under consideration. But it would seem that that is the very franchise which is always made transferable in the ordinary act of incorporation, without any special enactment; and that the ordinary mortgage made by the corporation is a mortgage of the other franchise, held not by the corporators, but by the corporation; viz., the right to build and maintain a railroad, and the rights incident thereto.

Considering, then, this last-named franchise, the English cases deny any right at common law to transfer it; and many of the best American opinions hold the same doctrine, though we have found no cases in this country which absolutely decided the point. In the case of *Worcester* v. *Western R. R. Corporation*, 4 Met. 566, Shaw C. J. says: "The company have not the general power of disposal, incident to the absolute right of property; they are obliged to use it in a particular manner, and for the accomplishment of a well-defined public object, and they are bound ultimately to surrender it to the public at a price and upon terms established." So in *Treadwell* v. *Salisbury Man. Co.*, 7 Gray, 404: "Corporations established for objects *quasi* public, such as railway, canal, and turnpike corporations, to which the right of eminent domain, and other large privileges, are granted, in order to enable them to accommodate the public, may fall within the exception" to the general case where powers of alienation are given. "Such corporations may perhaps be restrained from alienating their property, and compelled to appropriate it to specific uses, by mandamus or other proper process. But it is not so with corporations of a private character, established solely for trading and manufacturing purposes."

In these and other opinions the rule of the English law is approved, and rested on the ground of the public nature of the franchises.

The cases which express opinions in favor of the right of a railway corporation to transfer its franchise, do so on the ground that in the nature of the franchise there is nothing which should give ground for a restraint on such alienation; and they seem to rest on good authority, and be reasonable. The syllabus of the case before cited, *Hall* v. *Sullivan R. R. Co.*, 21 Law Rep. 138, says: "It *seems* that the right of building, owning, and working a railroad, and of taking tolls thereon, are not necessarily corporate rights, nor is there anything in their nature inconsistent with their being assignable. It is, however, the law in England, that such franchises, when granted to a corporation, cannot, for reasons of public policy, be delegated or transferred." And in *Bank of Middlebury* v. *Edgerton*, 30 Vt. 182, 190, "the right to build, own, manage and run a railroad, and take the tolls thereon, is not of necessity of a corporate character, or dependent on corporate rights. It may belong to, and be enjoyed by, natural persons, and there is nothing in its nature inconsistent with its being assignable." And in Com. Dig. tit. Grant (C.), cited in these cases, "So every one may grant things incorporeal;" "though it be only a franchise or a privilege; as the grantee of a fair or a market may grant it to another. 2 Rol. 46, l. 15." "So the grantee of an annuity *pro consilio impenso et impendendo*, made to him and his *assigns*" (this last word is not italicised in the original) "may grant it to another." These authorities, and the general principles of the law, support the position that there is nothing in the nature of the franchise itself held by the corporation, which should hinder its being assignable. And if, on the ground of the great responsibility imposed by the legislature, public policy should forbid the transfer by the corporation of its franchise, it is hard to see why the same public policy, on the same ground, should not forbid the transfer by the corporators of their franchise; since practically the whole management is vested in them of the franchise, which, in point of law, is vested in the corporation. And the management of the corporate franchise, which would seem to be the only point of importance to the public, can thus be shifted from those to whom it was originally intrusted by the legislature, and it is designed that it should be thus shifted. It would seem, then, that it is not in the nature of the rights, that the reason is to be found for denying these transfers by the corporation to be good, but in the ancient principles of the common

law which governed them, and all other real property rights, and made them all untransferable. Land and some other classes of those rights were finally, by statute and effect of time, made alienable practically, but these rights in corporations are still unalienable, unless made so originally by the terms of the grant. So if, under the old feudal law, the feoffment had been to feoffee, and any man he might appoint in his place, *i. e.* to feoffee and his assigns, like the case stated in Comyn, "annuity to him and his *assigns*," then he might have aliened his tenancy. But the feoffments were then made to him, and to no other, for his personal services.

The English cases all seem to support this position: that it is simply lack of power granted to the corporation, and not anything peculiar in the nature of the franchises granted to it, that hinders alienation by the corporation of those franchises. Thus in *Winch* v. *Birkenhead, &c. R. R. Co.*, 13 Eng. L. and Eq. 506, Parker V. C. says: "According to my view of the bill, the material allegation, which is not denied, is, that the line, property, and plant of the Birkenhead Company are to be handed over to the London and Northwestern Company without the authority of Parliament." "With respect to the agreement, his honor was clearly of opinion, to say nothing of that part of it which provided for an application to parliament, that the agreement was not within the *powers*" (italics our own) "of either of the companies at present. Parliament could give them powers, but, as the agreement stood, his honor thought that they could not perform it with their present statutory powers." The point seemed to be, not that there is anything in the rights themselves which forbids alienation, but, in accordance with ancient principle, the franchises were simply given to this corporation, with no power of alienation. The franchise given to corporators is given with powers of alienation. And on page 517, we find the expressions, "powers which are given exclusively to the Birkenhead by their acts of parliament," "part with certain statutory powers which they have no authority to part with." And in the case of *Shrewsbury and Birmingham Railway Co.* v. *London, &c. Co.*, 6 Eng. L. and Eq. 106, "Held, that parliament having, with a view to the public good, authorized the construction of large bodies, acting by directors, with specific and limited powers, and for certain specified purposes, and for the protection of the public, and the contract being to alienate tolls of a given portion of the line, such contract was contrary to the authority given by parliament, and was against public policy." The point insisted upon seems generally to be, not

the nature of the franchise, but of the corporation. If either a special power of alienation to a single alienee for a single instance were given, or a general power of alienation were given in the legislative act originally creating the corporation, then there is no difficulty.

All the English authorities, then, and most of the American ones, hold, or express opinions, that without special statutory powers, they cannot alien the franchise granted to them. And this seems to be the prevalent opinion among lawyers too, from the almost universal practice that exists of obtaining special legislative sanction for such transfers. The English cases, also, agree generally as to the ground of this disability; and their doctrine seems more reasonable and consonant to ancient principles of the law concerning alienation, than some of the opinions expressed in American cases of high authority.

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## RECENT AMERICAN DECISIONS.

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*Circuit Court of the United States.*

Massachusetts District—October Term, 1863.

EDWARD D. MURRAY *v.* WM. R. LOVEJOY, ET AL.

*Several actions and judgments against joint trespassers—Conclusiveness of judgments.*

A sheriff attached at the suit of creditors against their debtor, the stock in trade of a third person as the property of the debtor, taking an obligation of indemnity from the attaching creditors. The claimant brought his action of trespass against the sheriff and recovered judgment, which was in part satisfied. The action brought against the sheriff was defended by the attaching creditors, and at their expense, and they had the exclusive control of the defence.

*Held*, that the judgment against the sheriff, and part satisfaction, was no bar to a subsequent suit by the claimant against the attaching creditors for the same trespass.

*Held*, also, that upon the facts in the case, the judgment recovered against the sheriff, was conclusive in favor of the claimant against the attaching creditors.

*Joshua D. Ball*, for plaintiff.
*Henry C. Hutchings*, for defendants.

AGREED STATEMENT OF FACTS.

This is an action of trespass. The writ bears date on the first day of October, A.D. eighteen hundred and sixty. And the writ and declaration are made a part of the case.

The plaintiff is a citizen of Beloit, in the State of Wisconsin, and the defendants are citizens of Boston, Massachusetts.

The defendants in this suit, William R. Lovejoy & Co., on the sixteenth day of May, A.D. eighteen hundred and fifty-seven, in a suit wherein they were plaintiffs, and one O. H. Pratt was defendant, in the District Court of Dubuque County, Iowa, made an attachment in Dubuque of certain personal property, as the property of said Pratt, for which the plaintiff in this suit now sues. M. M. Hayden was the sheriff who made the attachment, Chapline and Dillon were the attorneys of said William R. Lovejoy & Co., in that suit, and gave a bond, a copy of which is hereto annexed, and which the defendants ratified. The said William R. Lovejoy & Co. recovered judgment against said Pratt, in said suit, and the property attached was sold by said Hayden upon said William R. Lovejoy & Co.'s process, by the direction of their attorneys.

The plaintiff in this suit claiming said property, on the thirtieth day of May, in the year eighteen hundred and fifty-seven, sued said Hayden in the District Court for said County of Dubuque for the same trespass in so attaching said property that he now sues these defendants for, and recovered, on a verdict of the jury, judgment against said Hayden in that action, on the twentieth day of October, A.D. eighteen hundred and fifty-nine, for six thousand two hundred and thirty-three dollars and three cents damages, and costs of suit, taxed at seventy-seven dollars and fifty-five cents, which judgment has never been reversed, and is still in full force. And the said Hayden satisfied said judgment in part, to wit, for the sum of $830 out of the proceeds of the attached property before the bringing of this suit against the defendants.

Either party may refer to a certified copy of said judgment against said Hayden as a part of this case. The said Hayden notified said William R. Lovejoy & Co.'s said attorneys, Chapline and Dillon, to defend said suit so brought against said Hayden, and said William R. Lovejoy & Co. employed and paid Chapline and Dillon to defend the same, and they did defend it, and had the exclusive control of the defence of said suit, being assisted therein by Benjamin M. Samuels, Esq., who was employed by William R. Lovejoy & Co., by their said

attorneys, Chapline and Dillon, and who was paid by William R. Lovejoy & Co., and said Hayden paid him also $100 out of the proceeds of the attached property.

On the twenty-eighth day of April, A.D. 1860, said William R. Lovejoy & Co. paid to said Hayden $1000, and said Hayden delivered up said bond to them, and it is now in their possession, the plaintiff not admitting that said bond was rightly delivered up.

Either party may refer to the printed laws of Iowa. If the court are of the opinion that the plaintiff cannot maintain this action against the defendants by reason of having recovered judgment against the sheriff Hayden, and by reason of having received part satisfaction of him, judgment is to be entered for the defendants, otherwise the case is to stand for trial before the jury, unless the court shall be of opinion that the defendants are estopped upon the foregoing facts, by the judgment in said suit against the said Hayden, from making further defence in this action, in which case the court are to enter such judgment as shall be proper.

Either party may prosecute a writ of error to the Supreme Court of the United States.

*Brooks* and *Ball*, plaintiff's attorneys.

*Hutchins* and *Wheeler*, defendants' attorneys.

Know all men by these presents, that we the undersigned, William R. Lovejoy & Co., of New York, C. J. Cummings, and B. W. Balch, of the City and County of Dubuque, Iowa, are held, and firmly bound unto M. M. Hayden, Sheriff of the County of Dubuque, State of Iowa, in the penal sum of nine thousand dollars, well and truly to be paid.

Dated this 16th day of May, A.D. 1857.

The condition of this obligation is such, that whereas the said Hayden, as Sheriff of Dubuque County aforesaid, has attached and taken possession of certain dry goods and merchandise, more particularly described in an inventory hereto annexed, and marked "exhibit A," at the request of William R. Lovejoy & Co., under and by virtue of a writ of attachment issued out of the office of the clerk of the District Court of Dubuque County, aforesaid, in the cause of the said *William R. Lovejoy & Co.* v. *O. H. Pratt*, now pending in said court.

Now, therefore, if the above bound William R. Lovejoy & Co. shall and will pay all damages which the said Hayden may sustain, or which may be recovered against him by reason

of his attaching said property as aforesaid, and shall in all respects save the said Hayden harmless in the premises, then this obligation to be void, otherwise in full force and effect in law.

Wm. R. Lovejoy & Co., by *Chapline* and *Dillon*, their attorneys.

C. J Cummings,
B. W. Balch.

Received, Dubuque, Iowa, April 28, 1860, from A. H. Dillon, Jr., for William R. Lovejoy & Co., one thousand dollars, balance in full of the above bond, all damages which I have, or may sustain, or which may have been, or may be recovered against me by reason of my attaching of property therein set forth.

M. M. Hayden,
*Ex-Sheriff of Dubuque Co., Iowa.*

Opinion by Mr. Justice Clifford :—

This is an action of trespass, and the case comes before the court upon an agreed statement of facts. Referring to the agreed statement, it will be seen that the present defendants, on the sixteenth day of May, 1857, in a certain suit, wherein they were plaintiffs, and one O. H. Pratt was defendant, attached certain personal property as the property of the defendant in that suit. According to the agreed statement, the suit was commenced in the District Court for the County of Dubuque, in the State of Iowa, and the writ of attachment was served, and the attachment made by the sheriff of that county ; but the case shows, that in serving the writ, and in making the attachment, he acted by the directions of the attorneys of the plaintiffs in the suit, and that they, the attorneys, gave him a bond of indemnity, conditioned that the plaintiffs should pay all damages he might sustain by reason of his making the attachment, and stipulating to save him harmless in the premises, and that the plaintiffs ratified their doings in giving the bond. Agreed statement also shows, that the plaintiffs in that suit recovered judgment, and that the property, so attached, was sold under the process of the plaintiffs, and by the directions of their attorneys. Property so attached and sold, was claimed by the plaintiff in this suit, and he, on the thirtieth day of May, 1857, brought an action of trespass against the sheriff, who had thus attached and sold the property. Due notice was given by the sheriff to the attorneys who brought the attachment suit

and gave the directions and executed the bond of indemnity, to appear, and defend the trespass suit, and the present defendants employed counsel and defended the suit. Trial was had, and on the twentieth day of October, 1859, judgment was rendered against the sheriff for the sum of six thousand two hundred and thirty-three dollars and three cents damages, and costs of suit, taxed at seventy-seven dollars and fifty-five cents. No execution ever issued upon the judgment, but the case shows that the sheriff satisfied the judgment against him, in part, to wit, for the sum of eight hundred and thirty dollars, out of the proceeds of the attached property. Present defendants employed the counsel to defend that suit, and had the exclusive control of the defence; and the case shows that they had paid all of the counsel fees, except one hundred dollars, which was paid by the sheriff out of the proceeds of the attached property, and it should be remarked, that both of the payments made by the sheriff out of the proceeds of the attached property, were made prior to the commencement of this suit. Mention should also be made of the fact, that, on the twentieth day of April, 1860, the present defendants paid the sheriff one thousand dollars, and that he, on the same day, surrendered the bond of indemnity to their attorneys; but it should be remarked, in the same connection, that the admission to that effect is accompanied by a denial on the part of the plaintiff in this suit, that the surrender so made was rightful, and also that the bond is now in the possession of the attorneys to whom it was delivered. Writ is dated the first day of October, 1860; and the agreement is, that if the court should be of opinion that the suit cannot be maintained against the defendants, by reason of the former judgment against the sheriff, and by reason of having received part satisfaction of him, then judgment is to be entered for the defendants; otherwise the case is to stand for trial, unless the court shall be of opinion that the defendants, upon the foregoing facts, are estopped from making further defence in this action, in which event the court is to enter such judgment as shall be proper. Practical questions, like those presented in this record, ought not now to be the subject of dispute or doubt, but it must be admitted, that in respect to most or all of them, it would not be difficult to present authorities of an entirely contradictory character. Certain general principles, however, which are applicable to the case, may be regarded as settled; and among the number is the rule, that the attachment and sale of the property of a third person, under the circumstances disclosed in the agreed statement, is tortious, as against the person whose

property is so taken and converted, and renders the sheriff liable to the plaintiff therefor, as a wrong doer.

Doubt cannot be entertained upon the subject, and it is equally clear, that the present defendants rendered themselves also liable to the plaintiff as wrong doers, by subsequently ratifying the directions given by their attorneys, and by approving what they had done, in giving the bond of indemnity. Indemnification itself must be regarded as a ratification of the attachment and as the cause of the subsequent sale; and the well settled rule is, that all persons who direct, or request another to commit a trespass, are liable as co-trespassers, if their directions or request are obeyed and followed. *Herring* v. *Hoppock*, 15 N. Y. 409; *Castle* v. *Bullard*, 23 How. 185. Where the attachment is made by the directions of the plaintiff, he is as much liable as the sheriff making it; and after conversion, the injured party may sue both or each one separately, as in other cases of joint and several liability. More than half a century ago, PARSONS C. J. held, in *Baker* v. *Lovett*, 6. Mass. 80, that where a trespass had been committed by several persons jointly, the party injured might sue any or all the trespassers, but he could have but one satisfaction for the same injury. Nothing is more clear, said Judge Story, in *Smith* v. *Rines et al.*, 2 Sum. C. C. 348, than the right of the plaintiff to bring an action of trespass or trespass on the case, against all the wrong-doers, or against any one or more of them, at his election. Undoubtedly, the injured party may proceed against all the wrong-doers, jointly, or he may sue them all or any one of them separately; but if he sues them all jointly, and has judgment, he cannot afterwards sue any one of them separately; or if he sues one separately, and has judgment, he cannot afterwards sue them all in a joint action, because the prior judgment against one is, in contemplation of law, an election on his part to pursue his several remedy; but it is no bar to a suit for the same trespass against any one or more of the other co-trespassers. Cases may be found, and have been cited at the bar, which assert a different rule, and which decide, that, where separate actions are commenced against several tort feasors for the same act of trespass, the pendency of the first suit may be pleaded in abatement of all the rest; but the doctrine, as was well said by Prentiss J. in *Sanderson* v. *Caldwell*, 2 Aikens, 201, is opposed to the principle which runs through all the authorities, that a separate trespass attaches to each of the parties individually, and which asserts that the plaintiff may sue all or any of them, or bring separate suits against each, at

his election. *Heydon's Case*, 11 Co. 5; *Mitchell* v. *Tarbott*, 5 Term. 649; *Thomas* v. *Rumsey*, 6 John. 30; *Livingston* v. *Bishop et al.*, 1 John. 290; Brooke, Abt. Judgment, Pl. 98; *Cooke* v. *Jennor*, Hob. 66; *Corbet* v. *Barnes*, W. Jones, 377; *Bird* v. *Randall*, 3 Burr. 1345. Much discussion, says Mr. Greenleaf, has taken place as to the effect of a former recovery, in cases where different actions of tort have successively been brought, in regard to the same chattel; as, for example, where an action of trover is brought after a judgment in trespass. Great diversity of opinion, he says, has existed, whether a plaintiff, after having recovered judgment in trespass without satisfaction, is thereby barred from subsequently maintaining trover against another person for the same goods. Decided cases, asserting the negative, assume that the recovery of the judgment, in trespass, for the full value, has the effect to vest the title to the property in the defendant in that suit; and consequently, that the plaintiff cannot recover of another for that which he himself has ceased to own. *Broome* v. *Wootton*, Yelv. 67. Other cases decide that the rule of *transit in rem judicatam*, extends no farther, than to bar another action for the same cause, against the same party. Of this latter class, the case of *Drake* v. *Mitchell*, 3 East. 258, may be regarded as the most important; and Mr. Greenleaf, after referring to it, states that the weight of authority seems in favor of the latter opinion, and the same views are expressed in numerous cases decided by different courts in the United States. Lord Ellenborough held, in the case last named, that a judgment recovered in any form of action, was still but a security for the original cause of action, until it was made productive in satisfaction to the party; and therefore, until then, that it could not operate to change any other collateral, concurrent remedy which the party might have. Attempt was made by a majority of the court in *Campbell* v. *Phelps*, 1 Pick. 62, to maintain that there was a distinction between cases of trespass or trover for goods, and trespass for a personal wrong or injury done to property; but PARKER C. J., who gave the opinion, was compelled to admit, that according to the modern decisions, nothing short of satisfaction of a judgment against one trespasser, for any tortious act, would bar an action against his associates; and WILDE J. utterly denied that there was any such distinction, and held, that a recovery against one person, without satisfaction, was no bar to an action against another, for the same cause, and that there was no difference in this respect between joint contracts and joint torts. Adverting to the maxim *solutio pretii emptionis*

*loco habetur*, Chancellor Kent says, 2 Comm. 10th ed. 388, that "the books either do not agree, or do not speak with precision on the point, whether the transfer takes place, in contemplation of law upon the judgment merely, or whether the amount of the judgment must be first actually paid or recovered by execution." Three theories, it will be seen, are stated by that author. First, that the mere recovery of judgment transfers the title, and he refers to *Broome* v. *Wootton*, Yelv. 67, as an example of the cases where that doctrine is held. Secondly, that the recovery of judgment merely, does not have that effect; but if execution follow, the two things combined transfer the property. Example given, is that of a case in Jenkins; but the language of the opinion is, that "by the recovery and *execution done thereon*," the property of the chattel is vested in the trespasser. Jenk. Cent. p. 189. Language to the same effect is employed in Shep. Touch., Title Gift, where it is said, that if one recovers damages of a trespasser for taking his goods, the law gives the trespasser the property of the goods, *because he has paid for them;* but he has not paid for them, unless something has been done besides the issuing of the execution, which is only an incident of the judgment, an act of the clerk. Two cases, however, are cited, which support that view of the law, but neither of them seems to rest upon any substantial basis. *Curtis* v. *Groat*, 6 John. 168; *White* v. *Philbrick*, 5 Me. 147. Thirdly, the reference is to the rule of the civil law, that when the wrongful possessor of movable property, who is not in a condition to restore it, has been condemned in damages, and has paid the same to the original proprietor, he becomes possessed of the title; and the learned author refers to *Drake* v. *Mitchell*, 3 East. 251, as an example of the decisions of the common law courts, where that view of the law is maintained. Commenting upon that case, he concludes by saying, this is the more reasonable, if not the most authoritative conclusion on the question. Some diversity of judicial decision still exists, even in this country; but the great weight of authority in the United States, is on the side of the theory, that nothing short of satisfaction transfers the title, and in that view of the question I entirely concur. *Morgan* v. *Chester*, 4 Conn. 387; *Hyde* v. *Noble*, 13 N. H. 501; *Sharp* v. *Gray*, 5 B. Mons. 4; *Hepburn* v. *Sewall*, 5 Harr. and John. 212; *Barb* v. *Fish*, 5 West. Law Jour. 279; *Calkins* v. *Allerton*, 3 Barb. 173; *Jones* v. *McNeil*, 2 Bailey, 474; *Sheehy* v. *Mandeville*, 6 Cranch, 253; *Cooper* v. *Shepherd*, 3 C. B. 266; *Knott* v. *Cunningham*, 2 Sneed, 204. Recovery of judgment merely, there-

fore, against one of several tort feasors, is no bar to a suit against another for the same trespass; and it makes no difference whether the plaintiff did or did not take out execution on the first judgment, unless it also be shown that he received satisfaction. Where no satisfaction has been received, the law is clear, to the effect as stated; but the defendants contend, in the second place, that the recovery of judgment against the sheriff, and the receipt of partial satisfaction of the judgment from him, operate as a complete bar, upon the ground that the receipt of partial satisfaction is an election, on the part of the plaintiff, to seek his redress against that party. But the reason assigned for the conclusion, if it be a good one, proves too much, because the plaintiff, when he brought the first suit, elected to seek redress against the party prosecuted, and that election, if such it be regarded, was confirmed by his act, in prosecuting the suit to judgment. Subsequent acts, however, such as the taking out execution or the receipt of past satisfaction, add nothing to the force of the argument that the institution of the suit, and the prosecution of the same to judgment, show that the plaintiff had elected to seek redress against that party. Recovery of judgment against one is an election, undoubtedly, to regard the remedy as several, and such an election is final and conclusive. But the judgment is no bar to another suit against another of the co-trespassers, as has already appeared, unless the judgment has been satisfied. Full satisfaction by one tort feasor, whether before or after judgment, is a good defence to a suit against any one of the others; but part satisfaction before suit would clearly be no defence, and it is not perceived that part satisfaction after judgment can have any other or greater effect. Suppose the part payment made by the judgment debtor had been made by him before he was sued; in that case it clearly would not have afforded him a full defence to the action, and if not, it is difficult to see how it can be any more effectual as a defence for a co-trespasser, because paid after judgment. Looking at the question as a question of principle, I am of the opinion that there is no middle ground on which a court of justice can safely stand in regard to it. When viewed in that light, it must either be held that the recovery of the judgment is a bar, or that it is no bar; and if the latter, as I hold, then nothing short of full satisfaction is an answer to a suit against another of the co-trespassers. Question is also made, whether the verdict and judgment against the sheriff are or are not conclusive upon the defendants. Affirmative of the proposition is assumed by the plaintiff, and the defendants maintain the negative. Facts of the case have

already been stated, and need not be repeated, except to say, that the case shows that the defendants were jointly liable for the same trespass, that they were duly notified of the pendency of the suit against the sheriff, and voluntarily appeared and conducted and controlled the defence.

Justice requires, says Mr. Greenleaf, 1 Greenl. Ev. sec. 522, that every cause be once fairly and impartially tried; but the public tranquillity demands, that having been once so tried, all litigation of that question between the parties should be closed forever. No man ought, however, to be bound by proceedings to which he was a stranger; but the converse of the rule is also true, which is, that by proceedings to which he is not a stranger, he may well be held bound. Under the term parties, says the same commentator, the law includes all who are directly interested in the subject matter, and have a right to make defence, adduce testimony, cross-examine witnesses, and control the proceedings, and appeal from the judgment. Courts of justice in general agree that a judgment of a court of competent jurisdiction is conclusive in a second suit between the same parties or privies on the same question, although the subject matter may be different, and *a fortiori* it is so when the subject matter is the same. *Doty* v. *Brown*, 4 Comst. 71; *Castle* v. *Noyes*, 14 N. Y. 331. All parties are estopped by the judgment who had a right to appear, control the defence, and appeal from the judgment. The attachment in this case, in legal effect, had been made by the directions of these defendants, and they had given a bond of indemnity to the sheriff, and stipulated to save him harmless. They were, therefore, under a moral as well as legal obligation to defend the suit; and when they were duly notified to make the defence, and appeared and assumed the control of it, in pursuance of such notice, they had the right to adduce testimony and cross-examine the witnesses, and might have appealed from the judgment. Appeal, undoubtedly, must have been taken in the name of the sheriff; but as they had appeared in the case in pursuance of notice, and the control of the defence had been conceded to them, under the stipulation in the bond of indemnity, to save the sheriff harmless, it cannot be doubted that they might have appealed from the judgment. *Castle* v. *Noyes*, 14 N. Y. 332. Where the first action was against the agent, who had taken lumber by the direction of the principal, and the case showed that the principal appeared and defended the suit, the Court of Appeals, in the case last mentioned, held that the parties in the second suit, which was a suit against the principal, who gave the directions, were to be

regarded as the same, and that the former judgment was conclusive. Parties appearing and defending under such circumstances, are regarded as having the same rights substantially as the party in fact, and as having the same power and authority to use the judgment against the adverse party. *Smith et al.* v. *Kernochen*, 7 How 217–219; *Calkins* v. *Allerton*, 3 Barb. 173; *Glass* v. *Nichols*, 35 Me. 328; *Wirfield* v. *Davis*, 14 B. Mons. 42: *Tarlton et al.* v. *Johnson*, 25 Ala. 314; *Eaton* v. *Cooper et al.*, 29 Vt. 444; *Peterson et al.* v. *Lothrop*, 34 Penn. St. 228; *Farnsworth* v. *Arnold et al.*, 3 Sneed, 252; *Train* v. *Gold*, 5 Pick. 387. Stipulation of the bond of indemnity was, that the defendants would pay all damages the sheriff might sustain, *or which might be recovered against him* by reason of his attaching the property, and, of course, they covenanted for the results or consequences of any suit which might be brought against him on that account; and I am of the opinion that such a covenant so connected them in privity with the proceedings, that the record of the judgment is as conclusive against them as the actual party to the suit. *Rapelye* v. *Prince*, 4 Hill, 119, 1 Greenl. Ev. sec. 523; *Carver* v. *Jackson*, 4 Pet. 86; *Case* v. *Reeve*, 14 John. 81; *Chapin* v. *Curtis*, 23 Conn. 388; *Emery* v. *Fowler*, 39 Me. 326. Judgment, therefore, must be for the plaintiff; but the question is also presented, as to what the amount shall be, and the authority is conferred upon the court "to enter such judgment as shall be proper." Attention should be called to the fact, that the case is presented upon an agreed statement of facts. Federal courts regard such statements as a part of the record; and hence it is that a writ of error will lie upon an agreed statement of facts. *Suydam* v. *Williamson and al.*, 20 How. 434; *U. S.* v. *Eliason*, 16 Pet. 291; *Stimpson* v. *Railroad Co.*, 10 How. 329; *Graham* v. *Bayne*, 18 How. 60.

Regarding the question in that point of view, that it appears of record in this case that the measure of the injury sustained by the plaintiff was legally ascertained in his suit against the sheriff; that it also appears of record that eight hundred and thirty dollars of that amount has been paid, and I am of the opinion that the plaintiff is entitled to recover the same damages as in the suit against the sheriff, deducting the amount received in part satisfaction of that judgment, as set forth and admitted in the agreed statement, but adding to the balance so ascertained a sum in the nature of damages equal to six per cent. interest on account of the delay.

*Judgment for plaintiff accordingly.*

*Supreme Court of Maine.*

## Inhabitants of Veazie *v.* The Penobscot Railroad Company.[1]

The Penobscot Railroad Company, under their charter and the general laws of the State, had a right to construct their railroad over or under a highway, and, for that purpose, to raise or lower the highway.

But they were bound to exercise this right in such a manner as not to obstruct the highway unnecessarily, and to use reasonable care to protect those passing thereon from injury.

The company are liable for any injuries happening to any one passing on the highway, on account of their neglect to use such care.

Nor are the company exempt from this liability, although the change in the grade of the highway is made by contractors grading the railroad under an agreement to do the work "according to the plans and directions of the chief engineer of the company," who is employed and paid by the company.

But a railroad company cannot, by *any* stipulations with contractors, relieve themselves from their obligation to protect the public from danger, when they interfere with or obstruct a public highway.

When a person, passing upon a highway, receives an injury, wholly by reason of an illegal defect in the same, caused by the alteration thereof by a railroad company, the town in which it is situated is liable for such injury.

The railroad company is liable to indemnify the town for all the damage it has been compelled to pay, and for the costs and expenses reasonably and fairly incurred, in a suit against them by the person injured.

When the railroad company has been notified of the pendency of such a suit, and requested by the town to assume the defence of it, they are bound by the judgment; and it is conclusive against them as to the cause of the injury and the extent of the damage, whether they appear in the case or not.

The railroad company cannot avoid the effect of such a judgment on the ground that they did not receive the notice until the day before the trial, it appearing that one of their directors was present at the trial and took notes, and that they made no request for a continuance or postponement of the trial.

An action by a town against a railroad company, for expenditures, to put in good condition a highway obstructed by the company's railroad, can be brought only within one year from the time when such obstruction was caused or created.

But, when a town has been compelled to pay damages on account of a defect in a highway, caused by the construction of a railroad thereon, it may maintain an action therefor, commenced within a year from the time when its liability is ascertained and fixed.

*(On Report.)*

Case to recover damages of the defendants for constructing their railroad across a highway, which the plaintiffs are bound

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[1] By kindness of Wales Hubbard, Esq., Reporter.

to keep in repair, in such a manner as to render such way unsafe, and dangerous for travellers thereon.

The case and the evidence, (so far as it relates to the questions of law raised,) are sufficiently stated in the opinion.

*Wakefield*, for plaintiffs; *Rowe & Bartlett* and *N. Wilson*, for defendants.

1. The judgment, *Phillips* v. *Plaintiffs*, was admissible only to show the fact of its rendition. For any other purpose, it is evidence only against parties or privies. *Sargent* v. *Salmond*, 27 Maine, 539; *Trustees of P. F. School* v. *Fisher*, 34 Maine, 172.

The notice of the suit was given too late. It cannot change the effect of the judgment.

2. The defendants, by their charter and the laws, had a right to construct their railroad across the highway. And they are not liable for damages consequent upon their contractors' doing, in an illegal way, a legal act, which the defendants rightfully hired them to do. Redfield on Railways, c. 22, and cases there cited.

3. The statute of 1853 does not apply to this case; and the action is not founded upon it.

4. The cut was an "obstruction" within the meaning of c. 81, § 11, of R. S. of 1841, and this action is barred by the limitation contained in that section.

5. If the Phillips judgment is admissible, it is a bar to this suit. The jury find, and the court adjudge, that he sustained his injury *through the negligence of the town* in not guarding the cut after notice of the existence of it. *Loker* v. *Damon*, 17 Pick. 284; *Thompson* v. *Shattuck*, 2 Met. 615.

The opinion of the court was drawn up by

Kent J.—The plaintiffs claim to recover of the defendants damages which they allege they have sustained by reason of the acts of the defendants, in causing a deep cut to be made in a highway in the town of Veazie. The first ground of damage is, the amount which the town has been compelled to pay to one Phillips, and the cost and expenses of defending a suit instituted by him against the plaintiffs, as primarily liable for the injuries caused by the defect. The second ground of damage is, the injury sustained by the town by the digging down, and the cost of repairs of the highway.

The defendants insist, in the first place, that whatever was done, was done in pursuance of their legal right by their charter, § 8, and by c. 81, § 8, of R. S. of 1841.

By the provisions of those acts, the railroad corporation had

an unquestioned right to have their road pass over or under the highway; and, for that purpose, to raise or lower any part of it. But, both by those statutes, and by the principles of the common law, the defendants were bound to exercise that right so as not unnecessarily to injure others. Corporations, as well as individuals, are bound to observe that excellent and compact rule, which has for centuries stood as the guardian and protector of individuals, against the reckless, tyrannical, or careless exercise of admitted rights. When applied to a case like this, it requires that the act permitted should be done in such a manner that the use of the road should not be unnecessarily obstructed, and that reasonable care should be used, by the erection of barriers, and otherwise, to warn and protect the citizens from danger and injury. The right to make the cut did not give the right to do it without due regard to the public safety; and that required that all proper guards should be erected and continued, whenever there was danger of injury to any person by reason of the cut. The charge in this case is, that the corporation made a deep cut, partly across the road, which was not well guarded by sufficient railing, against accident; and that one Phillips, travelling on the road in the evening, using due care, walked or fell into the hole or cut so made, and was injured. These allegations, if legally established, bring the case within the rule before stated, and it is not necessary to decide whether the provisions of the Act of 1853, (R. S. of 1857, c. 51, § 15,) are applicable to this case. Under that act, if the crossing had been made without the consent and action of the County Commissioners, or city authorities, as therein set forth, it would have been a nuisance, and, of course, an illegal and unjustifiable act. We have considered this point on the assumption that the act of cutting was legal. *Lowell* v. *Boston & Lowell Railroad*, 23 Pick. 24; *Drew* v. *New River Co.*, 6 Carr. & P. 754.

It is further objected, that this company is not liable for damages consequent upon the acts or neglects of the persons who had contracted with the corporation to do the work. It is contended that the contract was a legal one, and only authorized a legal act; and that, if the contractors performed this legal act in an illegal manner, the company is not responsible.

This point, it would seem, must have been raised and determined when this case was before the court, at a former term, on a statement of evidence offered. The fact that this work was done by contractors, was distinctly stated in that report; and the court, by ordering the case to stand for trial, notwith-

standing that fact, necessarily determined that it did not debar the plaintiffs from maintaining this suit.

We are not disposed to discuss at length the questions which have arisen in different courts in England and in this country, in relation to the limits of the liability of individuals who have contracted with others to do certain work, and by the negligence or fault of such contractors, during the progress of the work, injuries have arisen to others. The cases on this subject are collected and commented upon very ably, by Mr. Justice THOMAS, in the case of *Hilliard* v. *Richardson*, 3 Gray, 349. When applied to cases between individuals, not involving any question of public right, the rule, that if the injury occurred in the ordinary course of doing the work, and as part of it, the employer may be liable; but if, from some irregularity of the contractor, outside of his contract, he alone is responsible, may perhaps be the true and just one, where the relation is simply that of a contractor who is to perform his work without any interference, or control, or direction by the party employing him. Where such right to direct or control exists, or where the relation is that of master and servant, a different and opposite rule may be enforced.

In the case before us, the company stipulate that the work is to be done "according to the plans and *directions* of the chief engineer of said company," who is "to be employed and paid by the company." See *Wyman* v. *Pen. & Ken. Railroad Co.*, 46 Maine, 162.

But we place the decision on this point on the well settled doctrine, that, where the Legislature, as guardian of the rights of the public in a highway, permits a corporation or individual to use or interfere with the way, and to obstruct its use, on condition, express or implied, that all requisite care is to be taken to protect others from injury, the right thus granted must be exercised by the party to whom it is granted, and cannot be assigned, so as to relieve the party from the faithful execution of the power. The company may doubtless make contracts for the performance of the work; but cannot avoid their obligation to protect the public against danger, by the stipulations they may make. The grant of the Legislature is to a known and responsible company, as it is to be presumed, over which the Legislature has more or less control. Important rights are to be affected, and it would be a dangerous, as well as an unsound doctrine, to allow such a body to transfer their liabilities and obligations to the public and the individual citizens, to irresponsible or transient contractors. In the execution of such a

trust, or power, the company must be responsible, whatever contracts they may make. *Hilliard* v. *Richardson*, 3 Gray, 349; *Bailey* v. *Mayor, &c. New York*, 3 Hill, 531.

It is settled by various decisions, that, where railroads have the power by law to cut through and alter highways, and, in so doing, travellers sustain an injury, without fault on their part, by reason of an illegal defect, the towns in which the highways are situated are primarily liable for such injuries. *State* v. *Gorham*, 37 Maine, 451; *Willard* v. *Newbury*, 22 Vt. 458; *Currier* v. *Lowell*, 16 Pick. 170.

A town thus made liable may sustain an action for indemnity against the railway company, if that company was first and principally in fault, and the wrongful cause of the defect or neglect. The town is compelled by law and public policy to stand as guarantors, or in a position like that of surety for the company, that it shall not be guilty of neglect. When the wrong or neglect is altogether on the part of the company, the town may, nevertheless, be held to make good the injury to the individual. The liability of the railroad company is to indemnify the town fully for all the damages it has been compelled to pay, and for the costs and expenses reasonably and fairly incurred. *Lowell* v. *B. & L. R. R. Co.*, 23 Pick. before cited; *Duxbury* v. *Vermont Central Railroad*, 26 Vt. 751; *Hayden* v. *Cabot*, 17 Mass. 169.

The judge in this case ruled that the evidence put in was sufficient to authorize a verdict for plaintiffs, and was conclusive upon the defendants as to the cause of the injury to said Phillips, and as to the extent of the damage. The principal point thus raised, is, whether the judgment recovered by Phillips against the town, with the parol evidence, is conclusive upon defendants as to the cause and extent of the damage. The rule seems to be established, that, when a person is responsible over to another, either by operation of law, or by express contract, and he is notified of the pendency of the suit, and requested to take upon himself the defence, he is not afterwards to be regarded as a stranger to the judgment that may be recovered; because he has a right to appear, and make as full defence, as if he were a party to the record. *Coates* v. *Roberts*, 4 Rawle, 100. A judgment, after such notice, will be conclusive against him, whether he appeared or not; *Jackson* v. *Marsh*, 5 Wend. 44; *Thrasher* v. *Haines*, 2 N. H. 433.

It must be made to appear that the action is for a cause for which the defendant is liable. We think it does sufficiently appear, in this case, that the injury sustained by Phillips, for

which he sued, was occasioned by the acts or neglects of the railroad company. The declaration in the writ, *Phillips* v. *Veazie*, sets out, substantially, the same defect in the same place in the highway as the writ in this case, viz.: a cut partly across or into the highway, which was not well guarded by sufficient railing. The plaintiffs also introduced parol proof that the *locus* of the injury to Phillips was where the railroad, as located, crossed the highway, and that the cut was there made by the corporation or its agents.

The two declarations are identical. There is no cause for the injury set out in the first declaration which is not found in the one before us. With the connecting parol evidence, the identity of the cause of action, upon which the recovery was had, with that in this case, is sufficiently established.

The defendants contend that they did not have sufficient notice of the pendency of the former suit, and therefore are not concluded by it. The notice was given to the President, and to Mr. Wilson, a counsellor of this court, and a director of the company, on the day before the trial commenced; and Mr. Wilson was present at the trial, and took notes, but no part in the trial. The notice certainly gave but little time for preparation. But the town, so far as it appears, had made all necessary preparations, and the cause was fully and fairly tried. If the company had desired further time for preparation, they should have moved the court for a continuance, or have notified the town that they desired more time, or in some manner signified a wish for postponement. The fact that a director attended and took notes is important, and shows that that officer of the company had an opportunity to know how the trial was conducted.

The notice requested the company to assume the defence. If they had desired to do so, there was time sufficient to notify the town of that fact, before, or during the trial. No such notice was given, or desire expressed. We think they cannot now avoid their liability on this ground.

The defendants interpose the objection that both the claims sued for are barred by the limitation contained in § 11, of c. 81, R. S. of 1841.

That limitation of actions, to "one year after the causing of such obstruction," obviously refers to the right of action given in the preceding section, and is restricted to such actions as are brought by the town to recover damages done to the road itself, or for the amount expended by the town in putting the way in good repair, after neglect of the corporation so to do.

This construction covers the claim in this case, "for the repairs of the cut and road." The action not having been commenced within one year after the obstruction and these expenditures, the limitation applies, and the plaintiffs cannot recover for this item.

The other claim is not for an injury to, or expenditures upon the road, but to recover damages from this railroad corporation, for which the town was held liable, primarily, by a judgment of the court. The town could not legally commence the action until the damages to the individual had been ascertained and fixed in some mode, and the plaintiffs held liable therefor. In the 11th section, before referred to, the limitation is to one year after the obstruction is caused or created. But, if an injury to an individual should happen by reason of such obstruction, more than a year after its first creation, the right of action for such injury, against the town or corporation, would not be barred by this limitation of the statute. In this case, the action was commenced within a year after the liability of the town was ascertained and fixed. The right of action then first accrued, and the plaintiffs may recover for this item.

Judgment for plaintiffs for the amount paid to Phillips on his judgment against plaintiffs, with interest thereon, to time of final judgment in this case; also, for reasonable charges for counsel fees, witnesses, and expenses in defending said suit of Phillips, and interest thereon, as above.

*Tenney, C. J., Rice, Appleton, Cutting,* and *May JJ.* concurred.

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## RECENT ENGLISH CASES.

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SUFFIELD *v.* BROWN.—Nov. 10, 12; Jan. 15.

*Easement—Grant without reservation—Dock—Bowsprit of ship projecting over wharf.*

Where the owner of two adjoining properties makes an absolute sale and grant of one of them without reservation, neither he nor those claiming under him can derogate from that grant, by claiming over the property so granted an easement in respect of the other property, the user of which existed during the unity of ownership.

Before 1845 a dock and an adjoining wharf were in the possession of the same owner and occupier, and when vessels of large size were in the dock their bowsprits projected over part of the wharf. In 1845 the two properties were put up for sale, and the wharf was sold to A, without reserving any easement. The dock was afterwards sold to B, and, after the sale, the bowsprits of vessels were allowed to project over the wharf as before. On a bill filed by the owner and lessee of the dock to restrain the defendant, who claimed under A from building a wall on the wharf, which would prevent bowsprits of ships from projecting over it—

*Held* (reversing a decision of the Master of the Rolls), that there was no implied reservation of the easement, and that the plaintiffs were not entitled to an injunction.

*Held*, also, that the easement claimed by the plaintiffs was not a continuous, nor an apparent, nor a necessary easement.

The case of *Pyer* v. *Carter*, 1 H. & N. 916, not followed.

This was a suit instituted for the purpose of restraining the defendant, the owner of a coal wharf, from building a warehouse that would have the effect of depriving the plaintiffs, the owner and lessee of an adjoining dock, of an easement which they claimed to be entitled to use—namely, that of the bowsprits of large vessels, when in the dock for repairs, projecting over part of the defendant's wharf.

The wharf and dock were originally in the possession and occupation of the same person; and it was proved that, during that time, and long previous to the year 1845, the bowsprits of large vessels when in the dock projected over one corner of the wharf. In 1845 the owner of the two properties put them both up for sale, and the particulars described the dock as capable of holding two vessels of large size. The adjoining strip of land was described as a "freehold coal wharf," capable of being rendered worth a very large sum. No mention was made in the particulars of the alleged easement. By the conveyance of the wharf to the purchaser, Gibson, under whom the defendant claimed it was conveyed to the purchaser in fee, with its privileges, easements and appurtenances, and all the estate, &c., of the vendor, and no reservation was made of any easement belonging to the dock. The dock was subsequently sold to other persons, and the plaintiffs claimed under the purchasers. The bill prayed an injunction to restrain the defendant from building the wall. It appeared from the evidence that the bowsprits of ships in the dock had, since, as well as before, 1845, frequently projected over the wharf. The bill prayed that the defendant might be restrained by injunction from so building upon the wharf as to prevent the enjoyment by the plaintiffs of the easement and right of allowing the bowsprits of vessels in the said dock to overlay and overhang the defendant's wharf for the space of about fourteen feet.

The case came on before the Master of the Rolls, and is reported 9 Jur. N. S. 999. His Honor was of opinion that the plaintiffs had failed to establish a prescriptive right to the easement in question, but held that, on the grant of the wharf, there was an implied reservation of the right to allow the bowsprits to overhang the wharf, and made a decree that a perpetual injunction be issued to restrain the defendant from preventing or interfering with the full use and enjoyment of the dock by the plaintiffs in the manner that the same had heretofore been used by allowing the bowsprit of any vessel in the plaintiff's dock to overlay or overhang the portion of the defendant's wharf in the decree mentioned. His Honor gave no costs.

The defendant presented a petition of re-hearing.

*Selwyn*, *Q. C.*, and *Druce*, for the plaintiffs, in support of the decree.—The easement in question is necessary for the enjoyment of the dock. Where the owner of two properties sells them both, and an easement affecting one is necessary to the enjoyment of the other, such easement must pass to the purchaser. An easement of this kind is as much regarded by law as any other easement. In *Pyer* v. *Carter*, 1 H. & N. 916, 5 W. R. 371, where the owner of two adjoining properties sold one, the purchaser was held to be entitled to the use of a drain under the other without any express reservation. In the present case, it being notorious that ships have bowsprits, knowledge of the purpose for which the dock was used, and of the projection of the bowsprits, must be imputed to the purchaser of the wharf, and the grant of the dock carried such right of projection as a necessary appurtenance. The law relating to easements of a similar nature is found in Gale on Easements, 3d ed., pp. 85, 87, 99, 100, and is further illustrated by *Richards* v. *Rose*, 9 Exch. 218; *Riviere* v. *Bower*, 1 Ry. & Moo. 24; *Ewart* v. *Cochrane*, 4 Macq. 117, 10 W. R. 3. In *Hall* v. *Lund*, 11 W. R. 271, the easement was one the user of which was necessary to the enjoyment of the property at the time of the lease. This is a case of an apparent easement, for if a ship is put in a repairing dock, it must be put in a position where it can be properly repaired, and when so placed the projecting bowsprit must be visible, and it is unreasonable to suppose that the purchaser of the wharf did not know that the dock was intended for a vessel of full size.

*Mellish*, *Q. C.* (of the common law bar), for the defendant. There is no dispute as to the facts of the case. There had been unity of possession for many years. As long as the same person was in possession both of the dock and wharf adjoining, if

he had a vessel he could project the bowsprit over the wharf. He could sell the wharf either subject to the easement or not subject thereto. He put both up for sale, but nothing was then said about the alleged easement; the yard was first bought, and afterwards the dock. The practice of the owner when there was unity of possession cannot bind the purchaser of the servient tenement when the possession is severed. In Gale on Easements, 3d ed. p. 20, the distinction is drawn between continuous and discontinuous easements, and in p. 81 is shown what is implied on the severance of a heritage. The case of *White* v. *Bass*, 7 H. & N. 722, supported Lord Holt's decision in *Tenant* v. *Goldwin*, 2 Ld. Raym. 1090, which was doubted in Gale p. 84. The case mainly relied on by the Master of the Rolls was that of *Pyer* v. *Carter*, which was the case of a continuous and apparent easement belonging to the owner of the dominant tenement. There were four subsequent cases—*Worthington* v. *Gimson*, 29 L. J. Q. B. 116; *Pearson* v. *Spencer*, 1 Best & Sm. 571, 11 W. R. 471; *Dodd* v. *Burchell*, 1 H. & C. Exch. Rep. 113; *Polden* v. *Bastard*, 11 W. R. 778. Comparing the last with *Nicholas* v. *Chamberlain*, Cro. Jac. 121, it is clear that an apparent easement means some actual construction which can be described. *Swansborough* v. *Coventry*, 9 Bing. 305, was decided on the ground that the party was derogating from his own grant. The cases of *Richards* v. *Rose*, *Riviere* v. *Bower*, and *Ewart* v. *Cochrane*, were also cases of continuous and apparent easements, and in each of them there was some actual construction on the premises, as also in *Hall* v. *Lund*.

*Wickens*, on the same side, referred also to *Beaudely* v. *Brook*, Cro. Jac. 189; *Packer* v. *Welsted*, 2 Sid. 39, 111; *Howton* v. *Frearson*, 8 T. R. 50; *Holmes* v. *Goring*, 2 Bing. 76; *Proctor* v. *Hodgson*, 10 Exch. 824; *Pearson* v. *Spencer*, 1 Best. & Sm. 571: *Morris* v. *Edgington*, 3 Taunt. 24; *Jones* v. *Tapling*, 12 C. B. N. S. 826, 10 W. R. 441.

*Baggallay*, *Q. C.*, on same side.

*Druce* in reply.

Jan. 15.—The Lord Chancellor.—The plaintiff is the owner of a dock, situate on the Thames at Bermondsey, and used for repairing ships, principally sailing vessels. The defendant is the owner of a strip of land and wharf, adjoining the dock, on which he has begun to build a warehouse. The plaintiff has filed this bill for an injunction to restrain such building, on the ground that, when his dock is occupied by a vessel of large size, her bowsprit must project over the boundary fence of the dock, across the defendant's premises, which it cannot do

if the defendant's building is erected; and that he has a right to restrain such building, because it will deprive him of an easement or privilege which he is entitled to use or exercise over the land of the defendant. The plaintiff puts his case upon possession or enjoyment of the privilege claimed by him of sufficient duration to create a legal title. The Master of the Rolls has decided (and I think correctly) that the plaintiff has not proved a possession or enjoyment sufficient to create a legal title to an easement; nevertheless, his Honor has granted the injunction. The grounds on which his Honor proceeds are clearly stated; but, to understand them, it is necessary to state shortly the facts of the case. From the year 1841 until the month of June, 1845, a person named Knox was the owner in fee, and also the occupier, both of the dock and of the adjoining strip of land and coal wharf; and the evidence proves that during such period, whenever a ship of any size was taken into the dock to be repaired, her standing bowsprit projected over and across the adjoining strip of land. In the month of June, 1845, the two properties, the dock, and the strip of land and coal wharf, were put up for sale by Knox by public auction. In the description given in the particulars of sale, it is stated that the dock was capable of holding two vessels of large size, and that at low water several vessels, or a steamer of the largest class, could safely lie on "the ways" for repairs. The strip of land described and sold as a "freehold coal wharf," is stated to be capable of being rendered worth a very large rental by a comparatively small outlay. It is represented, therefore, as an improvable property, and nothing is stated to show that the dock or its owners either then had, or were intended to have, any right or privilege over the adjoining premises. At the auction the strip of land and coal wharf were sold to one Gibson, and by the conveyance, which is dated in July, 1845, the vendor (who at the execution of the deeds still remained owner of the dock) conveyed the strip of land and coal wharf to the purchaser, under whom the defendant claims in the most unqualified manner in fee simple, "together with all privileges, easements and appurtenances to the premises belonging, and all the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of the vendor in, to, or out of the same hereditaments and premises, and every part thereof." The dock was afterwards sold and conveyed to other persons, under whom the plaintiffs claim. The conveyance of the coal wharf, therefore, is the grant of a person who was at that time absolute owner of the dock, in respect of the ownership of which the

present right is now claimed by his grantees against the coal wharf, and it is very difficult to understand how any interest, right, or claim, in, over, or upon any part of the coal wharf, could remain in the grantor or be granted by him to a third person consistently with the prior, absolute, and unqualified grant that was so made of the coal wharf premises to the purchaser. Assuming that the vendor had been in the habit, during his joint occupation of both properties, of making the coal wharf subservient in any way to the purposes of the dock, one would suppose that the right to do so was cut off and released by the necessary operation of an unqualified sale and conveyance of the subservient property. It seems to me more reasonable and just to hold that if the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant, rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties), by the fiction of an implied reservation. If this plain rule be adhered to, men will know what they have to trust, and will place confidence in the language of their contracts and assurances. But this view of the case is not that taken by his Honor the Master of the Rolls. His Honor's reported words are these: "The ground on which the defendant cannot contest this right of the plaintiff is, because I think that such projection of the bowsprit from the vessel in the dock is essential to the full and complete enjoyment of the dock, as it stood at the time when he, or rather Gibson, under whom he claims, purchased the wharf, and that Gibson and he had distinct notice of this fact, not merely from the description contained in the particulars of sale under which he bought, but also because the fact was patent and obvious to any one, on the ground that if the dock admitted the largest vessel capable of being contained in it, the bowsprit must project over that portion of the wharf which I have pointed out." A little further down his Honor is reported to have said, "If, therefore, it be true that the dock can still be used, it is equally true that it cannot be used exactly as it has been heretofore; and my opinion is that this projection of the bowsprit is necessary for the due enjoyment in the ordinary sense of that term." The effect of this is, that if I purchase from the owner of two adjoining freehold tenements the fee simple of one of those tenements, and have it conveyed to me in the most ample and unqualified form, I am bound to take notice of the manner in which the adjoining tenement is used or enjoyed by my vendor, and to permit all such constant or occasional invasions of the property conveyed as

may be requisite for the enjoyment of the remaining tenement in as full and ample a manner as it was used and enjoyed by the vendor at the time of such sale and conveyance. This is a very serious and alarming doctrine. I believe it to be of very recent introduction, and it is, in my judgment, unsupported by any reason or principle, when applied to grants for valuable consideration. That the purchaser had notice of the manner in which the tenement sold to him was used by his vendor for the convenience of the adjoining tenement is wholly immaterial, if he buys the fee simple of his tenement, and has it conveyed to him without reservation. To limit the vendor's contract and deed of conveyance by the vendor's previous mode of using the property sold and conveyed, is inconsistent with the first principles of law as to the effect of sales and conveyances. Suppose the owner of a manufactory to be also the owner of a strip of land adjoining it, on which he has been for years in the habit of throwing out the cinders, dust, and refuse of his workshops, which would be an easement necessary (in the sense in which that word is used by the Master of the Rolls) for the full enjoyment of the manufactory, and suppose I, being desirous of extending my garden, purchase this piece of land, and have it conveyed to me in fee simple, and the owner of the manufactory afterwards sells the manufactory to another person, am I to hold my piece of land subject to the right of the grantee of the manufactory to throw out rubbish on it? According to the doctrine of the judgment before me, I certainly am so subject, for the case falls strictly within the rules laid down by his Honor, and it reduces them to an absurd conclusion. The first introduction of this extraordinary doctrine appears to have been made in the following manner:—A learned and ingenious author, the late Mr. Gale, published, in the year 1839, a work of great merit on this subject of easements, in which he derived from the doctrine of the French *Code Civil* certain rules with which he conceived that the law of England agreed, and, inasmuch as these conclusions have been cited with approbation in some recent cases at common law, and as they form the principal support of the plaintiff's argument, it is right to state and examine them. In chapter 4, he says: "The implication of the grant of an easement may be made in two ways: first, upon the severance of an heritage, by its owner, into two or more parts; and secondly, by prescription. Upon the severance of a heritage, a grant will be implied, first, of all those continuous and apparent easements which have, in fact, been used by the owner during the unity, and which are necessary to the use of the tenement

conveyed, though they have had no legal existence as easements; and, secondly, of all those easements, without which the enjoyment of the severed portions could not be had at all." It will be observed, that the learned author is not here speaking of easements which are already legally existing before the unity of possession, but of those which he supposes to arise for the first time by implication from the grant. If nothing more be intended by this passage than to state that on the grant by the owner of an entire heritage of part of that heritage, as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements which have been and are, at the time of the grant, used by the owners of the entirety for the benefit of the parcel granted, there can be little doubt of its correctness; but it seems clear that the learned writer uses the word "grant" in the sense of reservation or mutual grant, and intends to state, that where the owner of the entirety sells and grants a part of it in the fullest manner, there will still be reserved to such owner all such continuous and apparent or necessary easements out of or upon the thing granted as have been used by the owner for the benefit of the unsold part of the heritage during the unity of possession. This is clearly shown by what is subsequently laid down, that it is immaterial which of the two tenements is first granted, whether it be the *quasi*-dominant or *quasi*-servient tenement. But I cannot agree that the grantor can derogate from his own absolute grant, so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him, the grantor. Consider the easements as if they were rights, members, or appurtenances of the adjoining tenement; they still admit of being aliened or released, and the absolute sale and grant of the land in or over which they are claimed is inconsistent with the continuance of anything abridging the complete enjoyment of the thing granted, which is separable from the tenement retained, and can be aliened or released by the owner. Many rules of law are derived from fictions, and the rules of the French code, which Mr. Gale has copied, are derived from the fiction of the owner of the entire heritage, which is afterwards severed, standing in the relation of *pere de famille*, and impressing upon the different portions of his estate mutual services and obligations which accompany such portions when divided among them, or even, as it is said in French law, when aliened to strangers. But this comparison of the disposition of the owners of two tenements to the *destination du pere de famille*

is a mere fanciful analogy, from which rules of law ought not to be derived. And the analogy, if it be worth grave attention, fails in the case to be decided, for when the owner of two tenements sells and conveys one to a purchaser for an absolute estate therein, he puts an end by contract to the relation which he had himself created between the tenement sold and the adjoining tenement, and discharges the tenement so sold from any burthen imposed upon it during his joint occupation; and the condition of such tenement is thenceforth determined by the contract of alienation, and not by the previous user of the vendor during such joint ownership. And this observation leads me to notice the fallacy in the judgment of the Court of Exchequer in the case of *Pyer* v. *Carter* (*ubi. sup.*), being one of the two cases on which his Honor relies. In *Pyer* v. *Carter* the owner of two houses sold and conveyed one of them to a purchaser absolutely, and without any reservation, and he subsequently sold and conveyed the remaining house to another person. It appeared that the second house was drained by a drain that ran under the foundation of the house first sold, and it was held that the second purchaser was entitled to the ownership of the drain—that is, to a right over the freehold of the first purchaser, because, said the learned judges, the first purchaser takes the house "such as it is." But, with great respect, the expression is erroneous, and shows the mistaken view of the matter, for in a question, as this was, between the purchaser and the subsequent grantee of his vendor, the purchaser takes the house, not "such as it is," but such as it is described, and sold and conveyed to him in and by his deed of conveyance; and the terms of the conveyance in *Pyer* v. *Carter* were quite inconsistent with the notion of any right or interest remaining in the vendor. It was said by the court that the easement was "apparent," because the purchaser might have found it out by inquiry; but the previous question is, whether he was under any obligation to make inquiry, or would be affected by the result of it, which, having regard to his contract and conveyance, he certainly was not. Under the circumstances of the case of *Pyer* v. *Carter*, the true conclusion was, that, as between the purchaser and the vendor, the former had a right to stop and block up the drain where it entered his premises, and that he had the same right against the vendor's grantee. I cannot look upon the case as rightly decided, and must wholly refuse to accept it as any authority. But, to the earlier cases cited by the court in *Pyer* v. *Carter*, as authorities for its decision, there can be no objection. In *Nicholas* v. *Chamberlain*,

Cro. Jac. 121, it was decided that, if the owner of a house, being also owner of the land surrounding it, make a conduit through part of the land to the house, and then sells the house with its appurtenances, the right to the conduit passes—that is to say, the court held that the conduit was a thing appertaining to the house, and as such passed under the conveyance; and in the same case it was also decided, that if the owner sell the land, reserving the house, the right to the conduit is reserved, a decision which merely amounts to this; that the reservation, like the grant, of a house, is the reservation or grant of it with its appurtenances. To this case, and to the case in the *Year Book* of 11 Hen. VII., or the case of *Sury* v. *Pigott*, Palmer, 444, there can be no objection, but they do not give any support to the decision in *Pyer* v. *Carter*. The other case relied on by His Honor—namely, *Hinchcliffe* v. *The Earl of Kinnoull*, is of a different character, and does not apply to the question of easements reserved by implication, or the grant of the *quasi*-servient tenement. In that case there being two adjoining houses belonging to the same lessor, it appeared that the coal-cellar under one house was supplied through a shoot, the mouth of which opened in the yard of the adjoining house; and it was held that a demise by the owner of both houses of the first house, with its appurtenances, carried with it the right to use the coal-shoot, and also a right of way to the coal-shoot through the premises of the adjoining house, such way being necessary for the enjoyment of the coal-shoot, a decision which rests upon the ordinary principle of law, that if I grant a tenement for valuable consideration, I also grant a right of way to it through my land, if such way be absolutely necessary for the enjoyment of the thing granted. This case might have had some application to the present, if the dock had been the property first sold, and had been conveyed with all privileges, easements, rights and appurtenances, as then used and enjoyed by the vendor, being still the owner of the adjoining strip of land and coal wharf; but it is plain that no easement can arise by the necessary operation of a grant, unless it be in the power of a grantor to give such easement. It is true that there may be two tenements, as, for example, two adjoining houses, so constructed as to be mutually subservient to and dependent on each other, neither being capable of standing or being enjoyed without the support it derives from its neighbor; in which case the alienation of one house by the owner of both would not estop him from claiming in respect of the house he retains that support from

the house sold, which is at the same time afforded in return by the former to the latter tenement (which was the case of *Richards* v. *Rose*, 9 Exch. Rep. 218), but where the right claimed in respect of the tenement retained by the joint owner against the tenement granted by him is separable from the former tenement, it is severed, and either passed or extinguished by the grant. It must be always recollected that I have been speaking throughout of cases where (as in the present case) the easement claimed had no legal existence anterior to the unity of possession, but is claimed as arising by implied grant or reservation upon the disposition of one of two adjoining tenements by the owner of both, which is, in my opinion, an ingenious but fanciful theory, which is, as to part, not required by, and is, as to the other part, wholly inconsistent with the plain and simple principles of English law that regulate the effect and operation of grants of real property. There is, in my opinion, no possible legal ground for holding that the owner of the dock retained or had in respect of that tenement any right or easement over the adjoining tenement of the strip of land and coal wharf after the sale and alienation of the latter in the year 1845. I must entirely dissent from the doctrine on which His Honor's decree is founded, that the purchaser and grantee of the coal wharf must have known, at the time of his purchase, that the use of the dock would require that the bowsprits of large vessels, received in it, should project over the land he bought, and that he must be considered, therefore, to have bought with notice of this necessary use of the dock, and that the absolute sale and conveyance to him must be cut down and reduced accordingly. I feel bound, with great respect, to say that, in my judgment, such is not the law. But if any part of this theory were consistent with law, it would not support the decree appealed from, for the easement claimed by the plaintiff is not "continuous;" for that means something, the use of which is constant and uninterrupted; neither is it an "apparent easement," for, except when a ship is actually in the dock, with her bowsprit projecting beyond its limits, there is no sign of its existence, neither is it a "necessary easement;" for that means something without which (in the language of the treatise cited) the enjoyment of the dock could not be had at all. But this is irrelevant to my decision, which is grounded on the plain and simple rule that the grantor, or any person claiming under him, shall not derogate from the absolute sale and grant which he has made. Therefore, reverse the decree of the Master of

the Rolls, dissolve the injunction, and dismiss the plaintiffs' bill, with costs.

Solicitor for the plaintiffs, *Kearsey;* solicitors for the defendant, *Bridger & Collins.*

## Duranty v. Hart and Others.[1]

*Ship—Bottomry—Communication with the Owners.*

The *Hamburg*, during her voyage from America to London, put into the island of St. T., to repair damages which she had sustained. Mail steamers left St. T. for London, and London for St. T every fortnight. The master, three months after his arrival at the island, being without funds or credit, and acting *bona fide*, charged the vessel, her freight and cargo, by a bottomry bond, in order to secure the cost of her repairs. The cargo was not of a perishable nature, and it was not shown that the master was unable to ascertain the addresses of the consignees of the cargo, with whom he neither communicated nor attempted to communicate.

Held, that, under these circumstances, the bond could not be enforced against the owners of the cargo.

The question whether a master must communicate with the owners of the cargo before hypothecating it, can only be decided by the circumstances of each particular case.

The *Buonaparte*, 8 Moo. P. C. C. 459, explained.

This was an appeal from a decision of the Court of Admiralty.

The *Hamburg*, a schooner belonging to the port of Hamburg, was chartered for a voyage from San Juan de Nicaragua to Liverpool. She was laden with a cargo of Brazil wood, India-rubber, and indigo, of which the respondents were the consignees. During the voyage, on the 25th of April, 1861, the captain put into the island of St. Thomas, to repair the damage which his vessel had sustained. Upon a survey being made, the value of the *Hamburg* was estimated at 2000 Spanish dollars, and the cost of her necessary repairs (exclusive of extra work that might be found necessary) at $4820. The captain, being without funds or credit, applied to the agents of the shipowners for assistance. This was refused. The repairs, however, were commenced and completed by the 5th of July, 1861. The master advertised for a loan, and on the 24th of July, 1861, executed a bottomry bond on the ship, cargo and freight, to secure an advance of $7592.38, with a premium of 33 1-3 per cent. ($2530.96.) The *Hamburg* then set sail and

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[1] Privy Council.—Before Lord Chelmsford, Lord Kingsdown, and Sir John Coleridge.

reached Liverpool on the 13th of August, 1861, when ship, freight and cargo were arrested by a warrant from the Court of Admiralty, extracted by the plaintiff as the holder of the bottomry bond. The plaintiff, after receiving the freight and the proceeds of the sale of the vessel without opposition from the shipowners, amounting together to £704 17s. 3d., claimed by the present suit the value of the cargo, estimated at £895. The case was argued before Dr. Lushington, who, on the 31st of March, 1863, gave judgment against the bond so far as it concerned the cargo, saying that it did not appear to him that the facts of the case excepted it from the rule laid down in the *Buonaparte*, 8 Moo. P. C. C. 459, that the master must (if practicable) communicate or attempt to communicate with the owners of the cargo before charging it with a bond, and that it did not seem to him that the master was justified in thinking that what he did was for the benefit of the consignees. From this decision the plaintiff appealed.

*Milward* and *Vernon Lushington* for the appellant. The captain was not required to give notice to the consignees of the condition of the vessel. It was not likely that the part owners of the cargo would have contributed to the costs of repairing a ship which was not their own. He acted in all good faith. It would surely be hard to make the validity of the bond depend upon the value of the cargo when sold. The captain could not know the addresses of the consignees, and if he wrote to the charterers, could it be expected that they would advance much? If they had they would have lost their lien on the cargo. The decision of the court below would take from the shipowners the power of recovering general average. It is submitted that the rule laid down in the *Buonaparte* cannot be upheld. The old practice of requiring communication with the shippers in circumstances like these was owing to the fact that they were generally at hand.

They cited *The Gratitudine*, 3 C. Rob. 240; *The Buonaparte*, 8 Moo. P. C. C. 459; *Glascott* v. *Lang*, 2 Phil. 310, per Cottenham, L. C.; *The Oriental*, 7 Moo. P. C. C. 398; *The Olivier*, 1 V. Lush. Adm. Rep. 484; *Duncan* v. *Benson*, 1 Exch. 557, 3 Exch. 655; *Benson* v. *Chapman*, 5 C. B. 330; Kent's Comm. 3, 240; *Cammell* v. *Sewell*, 5 H. & N. 728; *The Priscilla*, 1 Lush. Adm. 1; *Nostra Senora del Carmine*, 1 Spinks, Ecc. & Adm. Rep. 303; *La Ysabel*, 1 Dodson, 273; *The Rajah of Cochin*, 1 Swab. 473; *Arthur* v. Barton, 6 M. & W. 143.

*The Queen's Advocate* and *Dr. Tristram* for the respondents.

The sole question is, could an attempt to communicate with the owners of the cargo have reasonably been made. [Lord Chelmsford. If there had been one hundred consignees, do you say that the captain must have given notice to each?] There may, of course, be circumstances which would allow of an exception to the rule. In hypothecating the cargo, the captain can only act as the agent of the shipper. Here there was no such agency. The case of the *Buonaparte* cannot, we submit, be reviewed. [The Court intimated that a decision in the Privy Council can only bind that court in a question where the facts are exactly the same.] It is admitted that tidings could have been sent to the owners. If that be the case, they were surely entitled to have their opinion taken before the whole of the cargo was charged. *The Royal Arch*, 1 Swab. 269, 275; *The Neptune*, 3 Hagg. Adm. Rep. 135; *The Segredo*, 1 Spinks, Adm. Rep. 45.

*Milward*, in reply.

March 16. Lord CHELMSFORD now delivered the judgment of the court. This was an appeal from the judgment of the High Court of Admiralty, which has been pronounced for the invalidity of a bottomry bond, in so far as it applied to the cargo of the ship *Hamburg;* and the question arose under the following circumstances:—[His Lordship then stated the facts, and continued.] Two objections were made in the court below to the claim of the bondholder, and were relied on in the argument on the appeal. It was urged, in the first place, that, looking to the small value of the ship, even when repaired, together with the freight, the master was not justified in incurring expenses which led to the necessity of borrowing so large a sum, but ought to have transhipped the cargo; in the second place, it was contended that, considering the circumstances just stated, and some which will presently be added, it was, at all events, the duty of the master, before he incurred these expenses and signed a bond which was to bind the cargo, to communicate, or at least attempt to communicate, with the owners of the cargo in England, and to have waited at least a reasonable time for their instructions. The facts now to be stated, which in some measure apply to both objections, but principally to the last, are these:—The cargo consisted, as has been stated, of Brazil wood, gum, indigo, and India-rubber, articles not of a rapidly perishable nature; it was consigned in different proportions to three separate houses in London; and their Lordships are not prepared to differ from the learned judge's opinion that the master, if he were ignorant of the addresses of these firms, had the

means at St. Thomas of ascertaining them, or one or more of them, or of procuring a letter to be forwarded to one or more of them. The means of postal communication between St. Thomas and England are fortnightly; the *Hamburg* arrived at St. Thomas on the 25th April, and the bond was executed on the 24th July. Mail steamers left St. Thomas for England on the 29th April, 14th and 29th May, 13th and 29th June, and 15th July, and mails for St. Thomas from London were made up on the 2d and 17th of each of the months of May, June, and July. Had the master, even if he passed over the mail of the 29th April, written by that of the 14th May (which, for anything that appears, he certainly might have done), he would probably have had an answer by the mail which left England on the 13th June, and might have been expected to arrive at the latter end of that month; and it appears that the negotiation for the bottomry loan did not commence until the 11th of July. It may be added, that although the master's conduct is severely reflected on as unauthorized, and wanting in good sense and consideration, no fraud or collusion is imputed to him; indeed, he seems to have acted under advice which by the law of his country he deemed himself bound to be governed by; a circumstance not entirely without significance as a fact, although their Lordships entirely agree with the learned judge of the Admiralty that the case is to be decided by the general maritime law as administered in England. Lastly, no fraud is imputed to the lender of the money on the bond. Upon this statement of facts their Lordships have to consider the propriety of the judgment. The first objection was disposed of by the learned judge very shortly and without difficulty, and, as their Lordships think, quite correctly. The master was certainly not bound to transship his cargo; indeed, his first duty was to carry his cargo to its destination in the same bottom, unless under the greatest difficulty. The learned judge rightly thought that the true force of this objection was not as an independent one, but that the circumstances on which it was rested might have their weight in the consideration of the second, on which, indeed, the judgment itself, and the argument on the appeal, mainly turned. This brings their Lordships to the consideration of that objection, and it is impossible for them not to perceive that, in dealing with it in the court below, it has been considered that it derived whatever weight it was entitled to from the decision of this committee in the case of the *Buonaparte*, reported in Moo. P. C. C. 459, which it was supposed had introduced a new rule of decision into this branch of maritime law. Whether this supposition be cor-

rect or not, undoubtedly if in itself that decision was both rightly understood below, and also rightly applied to the circumstances of this case, the learned judge could only determine the case before him as he has done. The important sentence in that judgment is to be found in page 473, and is as follows :—"That it is an universal rule that the master, if in a state of distress or pressure, before hypothecating the cargo, must communicate, or even endeavor to communicate, with the owner of the cargo, has not been alleged, and is a position that could not be maintained; but it may safely, both on authority and on principle, be said that, in general, it is his duty to do so, or it is his duty, in general, to attempt to do so." This sentence is followed by one which in the report is printed as follows :—"If, according to the circumstances in which he is placed, it is reasonable that he should, it was rational to expect that he might obtain an answer within a time not inconvenient with reference to the circumstances of the case; it must be taken, therefore, upon authority and principle, that it is the duty of the master to do so, or at least to make the attempt." This passage is obviously inaccurate. The judgment was not written, but appears to have been printed from a shorthand writer's note. It is not, however, difficult to collect what really was said by the learned judge, and, with a slight correction of the text, it would stand thus :—"If, according to the circumstances in which he is placed, it be reasonable that he should—if it be rational to expect that he may obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken upon authority and principle that it is the duty of the master to do so, or at least to make the attempt." That this is the true wording of the passage we have ascertained by communicating with the Lord Justice Knight Bruce, who delivered the judgment. It is a most important passage, and the complement and explanation of what goes before. The preceding sentence states that it is the duty of the master in certain circumstances to make or attempt to make the communication, and this sentence explains what the circumstances are in which this duty is imposed upon him. It shows what the learned judge understood by the expression "in general," if such words were used by him. The reporter has accurately stated in his marginal note the general rule established by the decision, though he has unfortunately omitted to correct the press in that portion of the judgment in which it is expressed. In the rule thus enunciated, their Lordships are unable to discern any

novelty, either in the principle on which it rests, or in its application to the case of the hypothecation of the cargo of the ship by the master. The character of agent for the owners of the cargo is imposed upon the master by the necessity of the case, and by that alone. In the circumstances supposed, something must be done, and there is nobody present who has authority to decide what shall be done. The master is invested, by presumption of law, with authority to give directions on this ground—that the owners have no means of expressing their wishes. But, when such means exist, when communication can be made to the owners, and they can give their own orders, the character of the agent is not imposed upon the master, because the necessity which creates it does not arise. It is clear that the rule as to communication must be either that, in no case and under no circumstances is it incumbent on the master to communicate with the owners of the cargo, or that, in some cases, and under some circumstances, it is incumbent on him so to do; either the universal negative or the particular affirmative proposition must hold, and both cannot be true, although one must be. But it has not been contended, and cannot reasonably be argued, that the first proposition is true. Where the cargo belongs to a single individual, known to the master, the ship in a port in the same country, or near to it, in which that owner is resident, the means of communication sure and speedy, the probable delay inconsiderable, the cargo not of a perishable kind, the money to be borrowed so large as to be sure to bring it within the operation of the bond, it could not be contended that the master could properly hypothecate it for the repairs of the vessel without first communicating with the owner. Equally clear it is that, where all these circumstances were reversed, no such duty would be incumbent on him. But if the first proposition be false, and the latter true, what is in effect the practical conclusion, but that the question whether a master must communicate or not, is one which can only be decided by the circumstances in each particular case? And this, which certainly seems consistent with the principle on which, as we have already observed, the maritime law makes the master, under certain circumstances, an agent for the owner in respect of the cargo, their Lordships believe to have been recognized by Lord Stowell in the case of the *Gratitudine*. This was not the precise point for decision in that case; but no one can read that admirable judgment attentively without perceiving that the duty of communication with the owner of the cargo before hypothecation under circumstances, and dependent on circumstances, was

familiar to the mind of the great judge who decided it. Thus, in 3 C. Rob. p. 259, "There are other cases also in port in which the master has the same authority forced on him. Suppose the case of a ship, driven into port with a perishable cargo, *where the master could hold no correspondence with the proprietor;* suppose the vessel unable to proceed, or to stand in need of repairs to enable her to proceed." Again, p. 261: Suppose the cargo to be not instantly perishable, but that it can await the repair of the ship, what is the master to do in the situation before described, being a stranger in a foreign port, in a state of distress, *without an opportunity of communication with the owners or their agent*—what is his duty under such circumstances? Again, p. 262: It cannot be said that he is *in all cases* to wait till he hears from a distant country. The repairs may be immediately necessary; it may be hoped that the repairs will be far advanced before he can hear from the consignees. The master may not know the proprietors at all, but only the consignees; they may be mere consignees and have no power to direct him, but in the single case of an actual delivery to them; if owners, they may be very numerous, for in a carrier ship there may be a hundred owners of the cargo, and the master may be in danger of receiving a hundred different opinions, supposing it were possible for him to apply to all: what does the necessity of such a case offer to be done? Again, p. 266, he answers an extreme case, put at the bar, of a valuable ship with a cargo of a considerable value belonging to Dover, being in distress at Calais, and says, "Undoubtedly the master should use his utmost endeavors to correspond with the consignees or proprietors; but a *case of instant necessity* might occur even so near, the master might not be *able to receive their directions*, all communication might be interrupted, as it is sometimes for a fortnight or three weeks." That the rule laid down in the case of the *Buonaparte* was properly applied in that case, no person who attends to the facts can entertain any doubt. There may be more doubt in the present case, but the learned judge has examined the evidence with great care, and appears to us to have arrived at a right conclusion. As to the supposed inconvenience of the rule, their Lordships do not forget that the lender of the money is the party interested in the event of the suit, and not the master. But there is no hardship in requiring from one who is about to advance a large sum of money under such circumstances, that he should inquire of the master whether he has communicated, or made an attempt to communicate with the owners the circumstances of his distress, and what he pro-

poses to do in regard to their goods. And it must be remembered, on the other hand, that the owners of the goods are equally interested, and, unless communicated with, have not the same means of protecting their own interests, which the lender undoubtedly has. If it be said that a decision in their favor will tend to increase the difficulty of procuring loans in foreign ports for the repair of vessels in distress, it may also be said, on the other hand, that it will tend, very much to the benefit of commerce in general, to discourage improvident or fraudulent advances. Their Lordships will humbly recommend to her Majesty that this judgment be affirmed, and the appeal dismissed with costs.

*Judgment for the respondents.*

Proctors for the plaintiff, *Tebb & Sons.*

Proctor for the defendants, *G. H. Brooks.*

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## DIGEST OF RECENT CASES.[1]

### Agency.

Where one was constituted an agent for the purchase and sale of goods in the name of the principal, a recital, in the power of attorney, that the principal "is about to leave upon a voyage to sea," does not limit the duration of the agency to the time when the voyage was completed.—*Forbes et al.* v. *Wooderson*, 49 Me. 14.

The owners of a certain tannery appointed an agent to act for them in "all matters and business relating to the tannery." *Held*, that he was not thereby authorized to bind his principals as receipters to an officer for horses, &c., used in the tannery which had been attached as the property of a third person.—*Weston* v. *Alley et als.*, 49 Me. 94.

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[1] These abstracts have been taken from the reports of recent English cases in the different periodicals, mainly from the *Weekly Reporter*, an excellent and reliable journal of legal matters, from advance sheets of the official reports, kindly furnished us by the reporters of the various States in which the decisions were rendered, and from reliable legal Journals in this country.

## Bailment.

The plaintiff borrowed £4 from the defendant, giving him in exchange a promissory note for £5. The plaintiff, at the same time, placed in the hands of the defendant two pictures. When the note became due, the plaintiff asked for further time, which the defendant granted upon the terms of one pound per month being paid to him as interest. No limit was fixed to the delay. After one month had elapsed from the time when the note became due, the defendant wrote to the plaintiff, saying that unless the amount of his claim were paid, he should proceed to sell the pictures. The defendant, by mistake, overstated in the notice the amount of his claim. The notice did not reach the plaintiff till long after it was sent, and when the plaintiff (shortly after receiving it) tendered to the defendant his debt and interest, he heard that the pictures had been sold. The jury found that no express power of sale was given to the defendant.

*Held*, that such a power of sale might have been implied by law under the original arrangement, but that there was evidence of a new agreement, whereby the power to sell was (until due notice from either party) postponed, and that this agreement was not rescinded by the defendant's letter wrongly stating the amount of his claim.—*Pigott* v. *Cubley*, C. P. May 25, Feb. 1.

A deposited with B some brandy lying in a dock, by delivering to him the dock warrant as a security for a loan, and agreed that B might sell the brandy if the loan were not repaid on the 29th day of January. On the 28th day of January B sold the brandy, and on the 29th handed over the dock warrant to the vendee. The loan was never repaid. A became bankrupt in an action of trover by A's assignee against B for conversion of the brandy.

*Held*, per curiam, that the sale and delivery over of the dock warrant, in pursuance of the sale, were a conversion; and

*Held* by Erle C. J., Byles and Keating JJ., that the damages were to be measured by the loss really sustained by the pledgor; and that in measuring them, the pledgee's interest in the pledge at the time of the conversion was to be taken into account; and that the plaintiff was entitled to only nominal damages, as he had sustained a merely nominal loss, having had no intention of redeeming the pledge by paying the loan; and

*Held*, by Williams J., that the bailment had been terminated by the sale, the effect of which was the same as if there

had never been a bailment, and that the property reverted to the pledgor, who was the absolute owner of it; and that where a person, if he had the opportunity, could resume the possession of the property, and hold it as against the whole world, as the plaintiff could here, he is entitled, in an action of trover for it, to the full amount of damages, which is the full value of the property at the time of the conversion.—*Johnson* v. *Stear*, C. P. Nov. 25, 1863.

## Carriers.

The plaintiff took his trunk to a railroad station at 11 A. M. and requested that it might be checked for the next train to B, which was to leave at 3 P. M.; but being informed by the agent of the company that they did not check baggage until fifteen minutes before the train left, he left the trunk with the agent, and at the proper time called for and obtained a check, and went himself by the same train. When he received the trunk again some money and clothing had been taken from it, but it did not appear whether it was done while the trunk was lying at the station or after it left. *Held*,

1. That the railroad company was to be regarded as receiving the trunk when first delivered for transportation and not for storage, and that their liability commenced as soon as it was delivered to and received by their agent.

2. That the delivery of a check was of no importance, as constituting the contract of the company, it being merely in the nature of a receipt, and intended as evidence of the ownership and identity of the baggage.

3. That the plaintiff could recover only for so much money, contained in the trunk, as was necessary for his personal use and travelling expenses, and that he could not recover for money carried in the trunk for the purpose of purchasing clothing at the place to which he was going.—*Hickox* v. *Naugatuck R. R. Co.*, 31 Conn. 281.

## Civil Death.

A professed nun by deed assigned all her present property, and covenanted to assign all her future property, to trustees, upon trust for the superior priest, for the time being, of the Brompton Oratory. She subsequently became entitled, under a will, to a sum of money. The trustees under the will having paid the money into court under the Trustee Relief Act, and the

lady having petitioned for payment out to the trustees for the Oratory,

*Held*, that she was entitled to receive payment, notwithstanding the fact of her being a professed nun; and that the trustees of the will had no good grounds for refusing payment, and ought not to be allowed their costs.

Profession as a nun is not now held to produce "civil death," or to alter a person's legal *status*.

*Re* Metcalfe's will, Lord Justice's Court, Mar. 7.

## Champerty.

By an agreement made at Paris, L, an attorney of the superior courts at Westminster, undertook to take all necessary proceedings, at his own risk and expense, for the recovery of a debt due to the plaintiffs, upon the terms that he should receive one-half of whatever might be recovered.

He then brought an action in England, in the name of the plaintiffs, which was compromised by the payment to him of a large sum of money.

*Held*, that the agreement was subject to the law of England, and therefore void for champerty, and that L being remitted to his ordinary rights as an attorney, was bound to hand over to the plaintiffs the amount of that which he had received in their action, deducting his own costs, as between attorney and client. —*Grell et al.* v. *Levy*, C. P. Jan. 19.

An attorney may render services and advance money in carrying on a law suit for a man without property, relying upon an agreement that he shall be first paid from the funds recovered; and this is not either maintenance or champerty.

If a third person fraudulently and collusively take an assignment of such claim, knowing the agreement of the party with his attorney, and such agreement is kept secret from the attorney while the law suit is in progress, and the assignee compromise the claim and receive the money, he will be held liable for the attorney's bill.

If an attorney, who is a director of a railroad, is openly employed to prosecute a suit against the railroad company, and he endeavors, as such attorney, to effect a compromise of the claim, this will be no objection to the recovery of his bill.

The representative of a party, who has employed an attorney to prosecute a claim, upon an agreement that the costs shall be paid from the proceeds of the suit, and who subsequently makes

an absolute assignment without warranty, need not be made a party to a bill in equity, brought by the attorney against the assignee to recover his bill.—*Christie* v. *Sawyer*, 44 N. H. 298.

### Contributory Negligence. (*See* Highway.)

### Corporation.

The directors of an insurance company will not be restrained from making payment, in the exercise of their discretion, and with the consent of a majority of the shareholders, to the insured, in respect of a loss not falling within the terms of the policies, such payments being conducive to the welfare of the company, and calculated to promote its interests.

Insurances against loss or damage by fire, contained a provision that the company would not be responsible for any loss or damage by explosion, except for such loss or damage as shall arise by explosion from gas.

A ship with gunpowder on board having caught fire and blown up, considerable damage was occasioned by the explosion to property in the neighborhood.

*Held*, having regard to the practice of insurance companies, and to the fact of the assent of a majority of the stockholders that the directors were not acting *ultra vires* in making good the amount of the damage to persons insured in the office who had been injured, and a bill in equity, by a shareholder, in restraint of the act, was dismissed with costs.—*Taunton* v. *Royal Ins. Company*, V. C. Wood's Court, Feb. 29.

### Dogs.

Although the common law recognizes property in the dog, it has always been esteemed a *base* property, and entitled to less consideration and protection than property in other domestic animals.

Any person may kill a *mad* dog, or one that is justly *suspected* of being mad, or that is known to have been bitten by a dog which was mad.

If a dog becomes mischievous, and inclined to injure *property*, his owner is bound to restrain him *on the first notice;* and is liable for any injury he may thereafter commit to property of *any kind*.

Although a dog, by entering alone on the land of another and doing mischief, cannot subject his owner to an action *quare*

*clausum fregit*, as cattle and other animals which are inclined to rove and prey upon crops may do, yet, if the owner trespass, and his dog attend him and do mischief unbidden, that action will lie for the injury.

Whether before mischievous or not, or his owner know it or not, if found *at large*, doing or attempting to do *mischief*, or it is absolutely necessary for the preservation of property, he may be killed.

A dog which haunts the premises of another, and by barking and howling becomes a nuisance, if he cannot otherwise be prevented, may be killed.

Whether dogs kept on the premises of the owner, may become a nuisance to adjoining proprietors by their *noise: Quære.* (*Street* v. *Tugwell*, 2 Selw. N. P. 1047, commented on and doubted.)

A *ferocious* dog, accustomed to bite mankind, is a *common nuisance*, and if found at large may be destroyed by any one. If sued for the killing of such a dog, the defendant need not aver or prove a *scienter*.

The *keeping* of such a dog is *wrongful*, and *prima facie* the owner is liable to any person injured, and the plaintiff may recover without averring *negligence* in *securing* or *taking care* of him; nor is negligence of the plaintiff a defence.

Whether the *wilful misconduct* of the plaintiff can be set up as a defence in case of injury committed by such a dog: *Quære.*

The owner of such a dog is liable if he bite a person in consequence of being *accidentally* trodden upon, or because *irritated* by a *child*, or if he attack or injure a *trespasser*.

Such a dog is a *dangerous instrument* for protection, and placing him for that purpose can only be justified in cases where the placing of concealed instruments may be justified to prevent a felony. Nor can such use of him by the owner under his personal direction be justified, where a like degree of injury may not be inflicted lawfully by a different instrument.

The statute which enacts that "whenever any dog shall do damage, either to the body or property of any person, the owner, &c., shall pay such damage, to be recovered in an action of trespass,"—imposes an obligation on the owner, &c., of *every* dog, to pay for *any* and *all damage* it may do of its own volition, and when the owner does not personally direct him to do it, so as to be liable for a personal trespass, unless the injury be done to a *criminal* wrong doer, in protection of his master's premises or property, and be such an injury as the owner might lawfully direct him to do if present.

In an action brought on that statute, the character of the dog, the *scienter* of the defendant, and the negligence of the plaintiff, are not material, except upon the question of damages.

Where a special finding of the facts in an action at law is placed upon file by order of the court as a part of the record, it is very questionable whether it can be regarded as strictly a part of the record.

This court will not review a decision of the superior court, where the whole case is spread by the court upon a finding of the facts, and it does not appear what particular rulings of the court upon points of law were made or were excepted to.—*Woolf* v. *Chalker*, 31 Conn. 121.

## Highway.

The defendants were occupiers of a house and cellar abutting upon a street, over the whole of which the public had a right of way, subject to the existence of such cellar. The defendants, for the purpose of obtaining access to the cellar, took the flap off and placed it against the wall in such a position, that it could be easily pulled over. While the flap was so placed, a child playing in the street with other children climbed up upon it, and caused it to fall, injuring himself and one of his companions.

*Held*, that, though the flap was so placed by the defendants, that, if a person passing along the street, had, without any carelessness on his part, pulled it over and been injured, he might have maintained an action, and, though the child climbing upon the flap was of tender years, yet, having voluntarily meddled with it, and for no lawful purpose, he had so contributed to the accident that he could not maintain an action.

*Held*, also, that if the other child injured was playing with the first, so as to be a joint actor with him, he could not maintain an action; but that, if he was not so playing as to be a joint actor, he could, as his injuries would then be the result of the joint negligence of the first child and the defendant's.—*Hughes* v. *McFie*; *Abbott* v. *McFie*, Exch. Nov. 24, Dec. 7, 1863.

A suit in the nature of a *denouciation de nouvel œuvre* cannot, by the law of Canada, be maintained after the work or structure complained of has been completed. It is necessary in such proceedings, clearly to show that the complainant will, in the ordinary course of events, suffer damage from the act of the

defendant. In an *action privée* for a public nuisance, the plaintiff must show that he has sustained injury beyond what is common to the public at large.—*Brown* v. *Lougy*, Priv. Coun. Feb. 2.

In a suit against a town for an injury from a defective highway, a juror, who was a considerable land-owner and tax-payer of the town sat in the case, and joined in a verdict against the town. The town moved in arrest of judgment for this cause. It appeared that the juror had been such land-owner and tax-payer for several years.

*Held*, that the interest of the juror was a disqualification, but that the fact of his interest must be regarded as known to the public officers of the town, and especially to the selectmen, its general agents, whose duty it was to make out and certify the rate-bills of the town, and that the town must be regarded as having waived the objection by going to trial without making it.

The injury was received by the plaintiff from the upsetting of a wagon at a place in the highway claimed to be defective. It appeared that for three or four rods the side of the road was depressed toward a ditch, that the road was narrow and the ditch on its margin, that the track was covered with ice and snow, that there was no railing, and that there was no substantial variation in the condition of the road for the whole distance. The plaintiff, for the purpose of showing that the road was dangerous to travellers, offered evidence that on the next day, and before any change had been made in the road, a cart was upset there in the same manner. The defendants objected to the evidence on the ground that the place of the latter accident, though within the space described, was fifteen or twenty feet from the place where the accident happened to the plaintiff.

*Held*, that the evidence was not inadmissible on this ground.

Whether, if the objection had been taken to the evidence generally, it should not have been held inadmissible as raising a collateral issue: *Quære.*—*Bailey* v. *The Town of Trumbull*, 31 Conn. 581.

## Insurance.

A party cannot be bound by a paper which does not on its face purport to have been made by him, or in his behalf, unless it is shown, by other evidence, that he has adopted it, or agreed to be bound by it.

The reference in a contract to a paper of the same name or

general description as the one produced in evidence, will not authorize a judge in his instruction to the jury to assume that the paper produced is the one referred to in the contract; but it is for the jury to determine whether the paper is the one referred to.

Objections to testimony, not made at the trial, are waived.

Warranties in a policy of insurance, or in the application when made a part of the policy, must be fully kept and performed, without reference to the question whether they are material or immaterial.

But misrepresentations do not avoid a policy of insurance unless they are material, or prejudicial to the insurers.

The renewal of a policy of insurance, without any new application, stands upon the same ground as the original policy.

Misrepresentations in obtaining a policy of insurance are waived by a renewal of the policy, with a knowledge of the risk.

If the instructions applicable to the case are correct, the verdict will not be set aside, although the presiding judge give erroneous instructions upon matters not relating to the case.

If the notice of a loss to the insurers is sufficient in form, it is for the jury to determine whether it is sufficient in substance.

If the assured uses his utmost exertions in protecting and securing the property insured, at, during, and subsequently to the fire, a loss by larceny falls upon the insurers.—*Witherell* v. *Maine Ins. Co.*, 49 Me. 200.

It is the settled policy of our law to treat local agents of insurance companies, who are authorized to procure and forward applications for insurance, as the agents of the companies and not of the applicants, in any mistakes of the application made by them or by the applicant under their direction.

An agent employed by such a local agent, in pursuance of a custom known to and approved by the company, to solicit and forward to him applications for insnrance, held to stand in the same relation to the company as to such mistakes.

Where a mortgagee applied for insurance through such an agent, intending to procure an insurance of his mortgage interest, and so stating to the agent, but the agent drew the application as for an insurance on the property itself, in the name of the mortgagor and as his property, the amount to be payable in case of loss to the mortgagee, and so made the application and had the policy so made in the belief that such was the proper legal mode of effecting an insurance on the mortgage interest, it was held that the mistake could be corrected by a court of chancery, although it was one of law and not of fact.

*Held* also that the insured was not affected by the fact that the agent had been instructed by the company not to take applications for insurance upon mortgage interests, he having no knowledge of such a limitation of the powers of the agent.

A condition in a policy that no suit shall be brought in case of loss unless within six months after the loss, is valid and binding on the insured.

But where an action at law was brought on the policy within the time limited, which it was found could not be sustained by reason of a mistake in the form of the policy, and a bill in equity was brought while that suit was pending, and after the six months had expired, for the correction of the policy and for an injunction against the defence set up in the action at law, it was held that the suit was not barred by the expiration of the time limited.

Where a condition of the policy provided that it should become void if any further insurance was obtained on the property insured, without the consent of the insurance company indorsed on the policy, and the owner of the equity of redemption procured a later insurance of the property of which no notice was given to the company and of which the party originally insured had no knowledge, it was held that as the original insurance was intended as an insurance of the mortgage interest of the insured, and was to be regarded as equitably such, the later insurance was not a further insurance of the same property, and not a breach of the condition.—*Woodbury Association* v. *Charter Oak Ins. Co.*, 31 N. H. 517.

## Judgment. (*See* Trespass.)

## Landlord and Tenant.

L, the owner of an estate with an eighty years' title, being under a will a specific devisee, in default of an heir, who was never forthcoming, after various unsuccessful claims, by entering and taking forcible possession, cutting down trees, &c., had various written notices served upon him by B, claiming to be heir, stating the acts and aggressions of his ancestors by cutting trees, taking possession, &c., and to the effect that he should, whenever convenient to himself or his friends, enter, cut sods, trees, &c., for the assertion of his rights. L filed a bill and obtained an injunction to restrain cutting sods and trees, on affidavit of service. The defendant went into no evidence, and at the hearing contended that the injunction ought not to have

been granted, and should not be made perpetual, the damage not being irreparable.

*Held*, that the acts threatened might extend to ornamental timber, and would be therefore irreparable; and the injunction was made perpetual, with costs.

Where the defendant is in possession, and the plaintiff seeks to restrain him from cutting trees, &c., the court will not interfere unless the acts are such a flagrant spoliation as to justify the court in departing from the general rule; and when the plaintiff is in possession, and they are the acts of a stranger, unless there are special circumstances the tendency of the court is not to grant an injunction. But where the party in possession claims an adverse title, the tendency is, unless there are special reasons why it should not, to grant the injunction, at least, where they do, or may tend to the destruction or injury of the estate.

*Semble*. The tendency of modern decisions, continually increasing from year to year, is to break down the old distinction between waste and trespass.

*Lowndes* v. *Bettle*, V. C. Kindersley's Court, Jan. 23.

## Limitations.

A being indebted to B in £566, wrote to him, stating that she should not be able to pay the debt till the death of her parents, but that she would do so when she was able. B accordingly forbore taking proceedings for payment until after the death of A's surviving parent, when she acquired the means of paying the debt.

*Held*, that the time did not begin to run against B till the happening of that event, and that the debt was therefore not barred, although more than six years had elapsed from the date of the letter.

After her parent's death, A wrote to B, alleging that she was still unable to pay the debt in full, but offering to pay him interest during her life, and to leave him £300 by will. B wrote a letter in reply, not acceding to A's proposition in so many words, but asking to have the £300 secured. A shortly afterwards made a will, leaving B £200, but without expressing any motive for the bequest.

*Held*, that the letters were admissible in evidence; that they showed that the legacy was given to B on the faith that he would accept it in part payment of the debt; and that he had

bound himself so to accept it.—*Hammond* v. *Smith*, Rolls Court, Dec. 21.

### Misrepresentation. (*See* Sale.)

### Nuisance. (*See* Highway.)

### Patent.

The application of a known article to a purpose analogous to that to which it had before been applied, is not the subject of a patent, although the result of the application may be the production in a cheaper and better manner of a known article.

*Held*, therefore, that double angle iron, being a well-known article, the application of it in the construction of the hydraulic cap joints of gas-holders, instead of constructing them by riveting two pieces of single angle iron to a plate, is not the subject of a patent.

*Horton* v. *Mabon*, Exch. Cham. Feb. 4.

### Sale.

A deed had been executed between A and B, the negotiation for which, on A's behalf, had been carried on by C, his solicitor. B filed a bill to set aside the deed on the ground that C had not disclosed certain material circumstances, the knowledge of which would have prevented B from executing the deed.

*Held*, that unless it could be shown that A was at the time aware of the circumstances, B was not entitled to relief.

*Solomon* v. *Honeywood*, V. C. Wood's Ct., Feb. 23, 1864.

### Ships and Shipping.

A libel was brought *in personam* against one Gellibrand, the charterer of the ship *Imperatrice Elizabeth*, and *in rem.* against certain wheat. It appeared that Gellibrand, on the 9th of September, 1863, chartered the vessel of which the libellant was master, except the deck, cabin and necessary room for the crew and storage of provisions and sails, for a cargo of wheat and flour from New York to London. That by the charter party, the libellant was to have a lien on the cargo for freight, dead freight, and demurrage, thirty-five days being allowed for loading and discharging, commencing on the 11th. That under this charter party, Arkell, Tufts & Co. shipped the wheat in ques-

tion, making it by the bill of lading subject to the terms of the charter party, when Gellibrand refused to furnish any more cargo, and before the ship could sail, it was found that the cargo delivered (the wheat) was badly infected with weevil, by which it was heating and sweating. That, meantime, one copy of the bill of lading had been indorsed by the shippers to bankers of this city, who had forwarded it to Europe. That the shippers and present claimants gave the first intimation that the grain was not in proper condition, and on examination was reported unfit, and recommended to be sold, and thereupon the present libel was filed to recover for freight, dead freight, and demurrage created by the charter party, and recognized in the bill of lading.

*Held*, that the lien of the libellant attached the moment the wheat was laden on board; that the libellant on behalf of the ship was entitled to recover out of the wheat the dead freight and demurrage accruing from the breach of the charter party by Gellibrand; that he was not bound to attempt to earn freight in point of fact by carrying an article that in all probability would be so depreciated in value at the end of the voyage as to be entirely inadequate in value to satisfy the claims of the ship under the charter party; that the shippers, having laden their goods under the stipulation of the charter party, were not only bound by them, but were responsible for the condition of the goods.

Decree ordered for the libellant, and the wheat having been sold by order of the court and the money paid into the treasury, sufficient of the proceeds to be applied to satisfy the libellant's claim, and as no freight, strictly speaking, was in point of fact earned, it was suggested by the court that the form of the decree should be for dead freight and demurrage, and that the amount to be recovered under this item should be measured by the difference between what a full cargo of wheat and flour from New York to London would have netted at the rates named in the charter party, and what would have been netted by any other reasonable freight which the ship might have obtained by the use of due diligence of the master, at as early a day as practicable after the charterer had abandoned his contract; that the expense of unloading and storing the wheat be reported by the Commissioner in a separate item, and that as to computing the number of demurrage days the rule should embrace the time during which the ship lay idle after the days had expired down to the time when she might, by the use of due diligence, have obtained other reasonable employment.

The court intimated, however, that counsel could be heard as to the form of the decree if they desired it.

*Stepanoistch, master* of the *Imperatrice Elizabeth*, v. *Gellibrand* and *certain wheat*. U. S. Dist. Ct., N. Y., Apr. 5, 1864.

## Statute of Frauds.

A parol promise to accept an order from a debtor in favor of his creditor, between whom and the maker of the promise there has been no privity, is within the statute of frauds as a promise to pay the debt of another.

Although a written promise to accept a non-existing bill operates as an acceptance, if the bill is drawn within a reasonable time, a verbal promise to accept such a bill is not valid.

Where A has a lien on a vessel for materials used in building it, and B holds the vessel to secure him for advances made to the builder, a promise made by B to accept the order of the builder in favor of A, for the amount of his claim, cannot be enforced, unless it appears to have been made for some consideration, such as a discharge of A's lien on the vessel, or his promise to discharge it, or to release his claim on the builder.

The fact that the acceptance of the order would, by operation of law, discharge the lien, would not be a consideration for a previous verbal promise to accept it.—*Plummer et als.* v. *Lyman et als.*, 49 Me. 229.

## Trespass.

A discharge of one of several joint trespassers is a discharge of all.

If separate judgments have been recovered there can be but one satisfaction of the damages, but the costs can be collected on all the judgments.

If, while separate suits are pending against several joint trespassers, one suit is settled and the defendant therein discharged, although it was the intention of both parties that the discharge should affect only the cause of action against the defendant, and that it should not affect the plaintiff's right of recovery in the other suits, it will yet operate as a discharge of the entire cause of action against all, and there can be no recovery in the other suits, either of nominal damages or of costs. [By Hinman C. J., and Dutton J., reversing the decision of Sanford J., in the court below; Butler J. dissenting.]—*Ayer* v. *Ashmead*, 31 Conn. 441.

# Notices of New Books.

A TREATISE ON THE LAW OF DOWER, BY CHARLES H. SCRIBNER. In two volumes. Philadelphia: J. B. Lippincott & Company. 1864. Vol. i. pp. xxxviii.—664.

It is a safe prophecy that the success which will attend Mr. Scribner's first volume, will induce him to put forth the second in reasonable time. We hope it may, speedily; for it gives good promise, on a rather careful reading, to be a very serviceable book. The author, in preparing a treatise on a branch of real law, for use in the United States, has adopted the very sensible plan of making it an American book. The possibility of pursuing this course with good practical results, has been completely demonstrated by Professor Washburn, in his Treatises on Real Property, and on Easements; and this volume furnishes additional proof of the fact in a welcome shape. Not that an acquaintance with English law is not to be desired; we believe that a student may still find profitable employment in the study of Coke on Littleton, Preston, Fearne and Cruise. But an American edition of a modern English treatise must be re-written, or it will, of necessity, contain a great deal of useless matter.

Our law and the English law, have sprung from common fountains; but the streams have diverged about equally from their common direction at starting; and it is very seldom that modern English real law is of any practical use to an American. A good book, prepared primarily for American use, is always to be welcomed, and always is welcomed, by the profession.

The citations of cases from the Eastern States, do not appear to be as frequent as is desirable; although, those which are given, appear to be well selected. There cannot be too many citations of authorities in a book upon a special subject; and the decisions of the courts of the States east of the Alleghanies, are as good authority, at least, as those of courts nearer the setting sun. The book is evidently the result of honest and well directed labor, and appears to be brought up fully to the present time. The mechanical execution is really excellent, and leaves little to be desired.

THE CHESAPEAKE. THE CASE OF DAVID COLLINS ET AL., prisoners arrested under the provisions of the Imperial Act, 6 and 7 Vict. c. 76, on a charge of piracy; investigated before HUMPHREY T. GILBERT, Esq., Police Magistrate of the city of St. John; and the arguments on the return to the order of habeas corpus, before His Honor Mr. Justice RITCHIE, with his decision, compiled from the original documents. St. John, N. B.: J. & A. McMillan, Publishers, 78 Prince William Street. 1864.

We are indebted to the kindness of The Law Society of St. John, for this interesting pamphlet, which will be read at the present time with an in-

creased degree of interest, in consequence of the rendition of Arguelles to the Spanish authorities. The result of the habeas corpus, in restoring the Chesapeake pirates to liberty, is well known; and it is not altogether gratifying to find that this result was reached mainly in consequence of informalities in the mode of making the demand for their surrender. At least, this, we think, is a fair statement of the tendency of the decision, though there is somewhat of an examination of the case upon its merits, in the course of which intimations are given as to the probable results which might have been reached had the decision turned upon those points.

Without reviewing fully the decision of His Honor Judge Ritchie, the points which he makes are substantially these:

"*First.* That the U. S. Consul was not properly authorized to make a requisition; and that, if he was authorized properly, he did not make it in a form sufficient to comply with the treaty and statute.

*Second.* That no charge had been made against the prisoners in legal form.

*Third.* That the piracy intended by the treaty, was not piracy by the law of nations, but only such an offence as is made piracy by municipal law.

*Fourth.* That the magistrate had no jurisdiction over the offence of piracy, and hence no right to examine into a charge of this kind.

*Fifth.* That the justice was warranted in believing the parties guilty.

*Sixth.* That the magistrate, upon receiving the governor's warrant, improperly received a new complaint, instead of confining his examination to the one on which the warrant was based.

*Seventh.* That the subsequent proceedings were all erroneous, being founded on the governor's warrant, and not corresponding therewith."

Of these points, the last one is the only one upon which His Honor seemed to rest with any satisfaction; and it is pretty certainly the only one which would stand upon a full and exhaustive investigation in the construction put upon the law by our courts.

The practical result of the third point, for example, if extended to other crimes, as it would seem that it ought to be, would be, in most cases, to nullify the treaty, since it would apply only to offences against the municipal law of the United States; while the evidence under the treaty and statutes must be such as makes out an apparent case under the New Brunswick law, which we may fairly suppose quite different from our own. Nor have we yet heard that the criminals have been tried in New Brunswick, although their liability to be so tried is the strongest argument advanced in support of the construction set up by the court.

We were rather struck to find the dissenting opinion of Mr. Justice NELSON, in Kaine's case, 14 How. 103, cited in a manner giving the impression that it was the opinion of the court, while the very able and instructive opinion of Mr. Justice CURTIS, reaching the same conclusion with the majority of the court, was ignored. There are many of the points above stated on which we think it might reasonably have been expected that His Honor

would have reached a different conclusion. This is to be regretted, as the case is said to be the first one which has arisen in New Brunswick under the Act to enforce the provisions of the Treaty of 1842, for the rendition of fugitives from justice; though the practical result may only be an increase of a somewhat undesirable class of inhabitants of the province by a *quasi* compulsory emigration from the United States, in which case our regrets ought to be proportionally mitigated.

The report is very full, and apparently accurate, and is creditable to the skill and enterprise of our provincial neighbors.

ARGUMENT OF L. MADISON DAY before the UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, in the case of THE UNITED STATES *v.* THE PROPERTY OF THOMAS GRISWOLD & Co., Dec. 4th, 1863. New Orleans. 1864.

This is a very elaborate argument, covering sixty closely printed pages in support of the constitutionality of the Act of 1862, 12 U.S. Stat. at Large, 590 *et seq.*, commonly called the Confiscation Act. It is by far the fullest and most satisfactory statement which we have yet seen of the reasons why Congress may be held to have had power to pass the act referred to. Whether supported or overthrown by the final decision of the case, the argument will be found a valuable addition to the library of the student of our constitutional law, and extremely creditable to the ability and industry of Mr. Day.

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# Intelligence and Miscellany.

"A VERY singular case was tried at Chelmsford, England, on the 8th of March, before Chief Justice Erie, disclosing a practical belief in witchcraft on the part of some persons of the lower class.

"The case was a prosecution directed by a private gentleman residing at Sible Hedingham, against one Emma Smith, wife of a beerhouse keeper at Ridgewell, and Samuel Stammers, a carpenter, charging them with causing the death of an old man named 'Dummey.' This name, which is given in the proceedings, seems to have been a *sobriquet;* for the old man, about 80 years of age, was both deaf and dumb; and though he had lived in the county for twenty years, eight of which were spent in a miserable mud hut near Sible Hedingham, nobody knew his birthplace, or country, although he was supposed to be a Frenchman. His age, wretched appearance, habits, the grotesque gestures by which he made himself understood, and his excitable temper, had gained for him the unfortunate reputation of practising witchcraft."

"He was in the habit of travelling

about to the adjoining villages, and, no doubt, gained his livelihood by telling fortunes, and was generally consulted by the young people of the locality as to their love affairs. He usually wore two or three coats, the number of which he increased according to the heat of the weather, and two or three hats of different descriptions at the same time, and was always accompanied by three or four small dogs."

"Still, he seems to have been quite inoffensive, and in spite of these extraordinary habits, which might certainly account for any sort of a reputation with the ignorant, he was kindly treated by the better class, and was a general source of amusement. In an evil hour, however, he went to the defendant Smith's beerhouse, near Ridgewell, and made her acquaintance. On one of his visits, being refused a night's lodging, 'he stroked his walking-stick,' and 'used other threatening signs,' which were looked upon with some awe."

"Soon after this expression of the old man's displeasure, the prisoner, Emma Smith, became ill and disordered, and was reduced to a low, nervous condition, and at once expressed her conviction that she had been bewitched by old Dummey, and that she would never recover till she had induced him to remove the spell from her, and made several applications to him for that purpose, as it would seem, without effect. At last, and while laboring under great mental and nervous excitement, she went from her home at Ridgewell to Sible Hedingham, on the evening of the 3d of August, 1863, and met old Dummey at the Swan Public House, which is situated about a quarter of a mile from Dummey's hut."

"She tried to induce the old man to return with her to Ridgewell, but he 'drew his fingers across his throat, implying that he was afraid of having his throat cut.' The villagers, hearing that a woman whom old 'Dummey' had bewitched was at the Swan, soon collected, 'and the old man was pulled and danced about,' getting some heavy falls."

"After the closing of the Swan the parties adjourned outside, and the prisoner Smith was seen standing by the side of Dummey, declaring that he should go home with her. She then tore the old man's coat, struck him several times over the arms and shoulders with his stick, and kicked him and dragged him down to a little brook which runs across the road, and down a lane near the Swan, and was proved to have said, 'You old devil, you served me out, and now I'll serve you out.' Smith then shoved him into the brook, and when he was getting out the other side she went round over a little bridge, and the other prisoner Stammers went through the brook, and they both pushed him back into the brook. He afterwards succeeded in getting out, and went and sat on a stoneheap until the two prisoners again dragged him towards the brook, and one taking hold of him under the armpits and the other by the legs, they threw him into the brook at a point where the water is dammed up, and was of some little depth, where he remained struggling, until one of the villagers called out 'that if some one did not take the old man out he would die in a minute,' when the prisoner Stammers jumped

into the water and pulled him out. He lay on the grass for some time in a very exhausted, and wet and muddy state, and was ultimately led home to his miserable hut, where he lay in that condition, in his wet clothes, all night."

"On the next morning the prosecutor found the old man still shivering in his wet clothes in his hut, bruised, and screaming with pain, when touched. Old 'Dummey' was taken to the workhouse and cared for, but closed his wretched existence a month later; and, as the result of a *post mortem* examination, the medical witnesses gave it as their opinion, that he died from a disease of the kidneys, caused by immersion in the water, and sleeping in his wet clothes. At the trial, direct evidence of the throwing into the brook was given by a little girl, 'who gave her evidence in such a way as to elicit from the learned judge the observation that she was gifted with the most extraordinary power of intellect and clearness of expression he had ever met with, and that he could conceive no possible reason to doubt the truth of her story.' The name of this little prodigy of a witness was Eva Henrietta Garrad. Her evidence was relied upon in spite of arguments for the defence, and the jury believed, also, that death ensued as the result of the immersion, for the prisoners were immediately found guilty, and sentenced to six months' hard labor; the chief justice saying that he took into account the 'mental condition of the female prisoner,' and the fact that Stammers pulled the old man out when he 'found that there was really danger.'

"If some Sir Matthew Hale of this century were to undertake a formal trial for witchcraft, it would seem that there is a population in the village of Sible Hedingham, among whom he could find a believing jury."

Married women are liable to arrest in civil process in New York, if they have separate property. See Annie Wilson *v.* Henriette Sulzer, Common Pleas, March 10.

Among the recent promotions at the English Bar, we find the name of a co-religionist, John Simon, Esq., of the Middle Temple, who has been called to the degree of sergeant-at-law. The learned gentleman, we understand, went through the ancient ceremony of receiving the "coif" (the insignia of his rank) from the Lord Chancellor, at the House of Lords, on Thursday, the 11th inst. Mr. Sergeant Simon is the first Jewish member of the English Bar who has attained this rank—the most ancient at the bar; and we heartily congratulate him on his well-earned promotion.—*Jewish Chronicle.*

In the course of a recent debate in the English Parliament, it was stated that the fee of a leading counsellor in a late case, was one thousand guineas, besides which he had a refresher of three hundred guineas a day—very refreshing.